TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 23.

JOSE PARADO, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

(20,220.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 270.

JOSE PARAISO, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

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1 In the Supreme Court of the United States, January Term, 1906.

JOSÉ PARAISO, Plaintiff in Error,
v.
THE UNITED STATES OF AMERICA, Defendant in Error.

In Error to the Supreme Court of the Philippine Islands.

Proceedings Had in the Court of First Instance of the Province of La Laguna, Philippine Islands, and the Supreme Court of the Philippine Islands:

THE UNITED STATES, Plaintiff,
v.
JOSÉ PARAISO, Defendant.

Be it remembered that heretofore, to-wit, on the 29th day of July, 1904, in the Court of First Instance of the province of La Laguna, Philippine Islands, came Higinio Benitez, as prosecuting attorney for the said province, and filed in the clerk's office of said court a complaint signed and sworn to by him, against José Paraiso, which complaint is in the words and figures following, to-wit:

2 *Complaint or Information.*

THE UNITED STATES
v.
JOSÉ PARAISO.

For Falsification.

In the Court of First Instance of the Sixth Judicial District, Santa Cruz, Province of Laguna, the 29th day of July, 1904.

The undersigned accuses José Paraiso of the crime of falsification, committed as follows: That the said José Paraiso, in his capacity as municipal treasurer of Lumbang, entered upon registration tax certificate No. 481,054, issued at Lumbang the 31st of May, 1904, to one Pedro Robie, the amount of $6.00, and erased from the stub thereof the figures written thereon, with the exception of the two -00, leaving traces of the figure thus erased, there appearing, however, upon the same stub, written in pencil by the accused, the figures 2.00, this being the amount shown on the abstract submitted to the provincial treasurer, all of this with intent of gain.

That on registration tax certificate No. 481,052, issued at Lumbang on the 31st day of May, 1904, to Francisco Guimoc, he entered the amount of $4 as the price of the said certificate, whereas on the stub thereof he only entered the amount of $2, thereby committing

the crime of falsification of a document, provided for and penalized under paragraphs 4, 6 and 7 of section 300 of the Penal Code. It further appears from the abstract submitted by him that the amount received was $2.00, thus defrauding the government to his personal advantage and gain.

That at different times during the year 1904, in his capacity as municipal treasurer of the town of Lumbang, Laguna, he
3 issued registration tax certificates to the following persons, under the following numbers:

Eduardo Llantos, No. 481053; Damaso Garcia, No. 481044; Apolinario Almario, No. 339727; Cenon Labra, No. 339899; Pablo Cristobal, No. 339897; Luis Abi, No. 339877; Leon Mondes, No. 339852; Luis Valdomora, No. 339848; Gregorio Mulingbayan, No. 339846; Filemon Mercado, No. 339840; Pablo Samonte, No. 339795; Mariano Magano, No. 339785; Vicente Valdeavella, No. 339783; Juan Wadis, No. 339763; Mateo Laguartilla, No. 339744; Faustino Rosales, No. 339707; Deogracias Babia, No. 339701; Dionisio Abad, No. 339694; Eduardo Ramillosa, No. 339673; Monico Abad, No. 339660; Conrado Lagunda, No. 339632; Juan Tablico, No. 339605; Ubaldo Mercado, No. 339541; Juan Puhauan, No. 339510; Antonio Eborda, No. 339379; Cirilio del Castillo, No. 339375; Valeriano de Ramos, No. 339341; Mateo Pacoma, No. 339313; Mariano Valdeavella, No. 339491; Benedicto Valdeavella, No. 339490; Juan Mercado, No. 339477; Epifanio Vallestro, No. 339445; Marcelino Cabalsa, No. 339499; Marcelo Tabirao, No. 339905; Placido Macadagay, No. 339837; Juan Valeavella, No. 339604; Bernabe Yamballa, No. 339558; Léon Abi, No. 339540; upon which said certificates there appear to have been entered and collected by the accused larger amounts than those shown on their corresponding stubs after he had settled his accounts with the provincial treasurer; and that the said stubs, or most of them, contain erasures, changes and alterations, all of which said acts are punishable under paragraphs 4, 6 and 7 of section 300 of the Penal Code, relating to the crime of falsification, for the purpose of gain.

Witnesses: Mr. C. H. Lamb, Provincial Treasurer, Laguna;
4 Manuel Abad, clerk Municipal Treasurer's office, Lumbang, Laguna.

(Signed) HIGINIO BENITEZ,
Provincial Fiscal.

Subscribed and sworn to before me this 29th day of July, 1904, at Santa Cruz, Province of Laguna, Philippine Islands.

(Signed) MARIANO LIM, *Clerk.*"

Afterwards, to-wit, on the 4th day of ——, 1904, the defendant José Paraiso was arranged in said court of First Instance before the bar of said court, and pleaded not guilty, and the trial of said cause was set for the 9th day of —— at eight o'clock A. M.

Afterwards, to-wit, on the 8th day of August, 1904, the said defendant, José Paraiso was tried before the Hon. Ignacio Villamor, Judge of the Court of First Instance of the said province, without a

jury, and the court, after hearing the evidence introduced, rendered the following

Decision.

José Paraiso is charged with the crime of falsification. The complaint is based upon the fact that the accused, in his capacity as municipal treasurer of the town of Lumbang, Laguna, issued various poll tax certificates to different tax payers, and entered upon the stubs corresponding to said certificates smaller amounts than those which appeared on the certificates themselves as having been collected by the accused, and thereafter submitted to the provincial treasurer his accounts, based upon the said stubs, which said stubs show evidence of certain erasures, changes and alterations.

The prosecution introduced in evidence forty poll tax certificates, two stub books and the abstracts of collections submitted by the municipal treasurer to the provincial treasurer; alo the testimony of the treasurer, that of his clerk, Mr. H. C. Lukembill and Manuel Abad, who was a clerk for the defendant.

Of these witnesses the first one testified that the accused,
5 as municipal treasurer of Lumbang, is also the deputy provincial treasurer, and as such is charged with the issuance of poll tax certificates within his municipality. The same witness, as well as Mr. Lukembill, testified that they had examined the abstracts of collections presented by the defendant and that they found the same to correspond with the stub books. They further testified that the defendant admitted to them that certain alterations had been made in the stubs, and asked them to protect him. The last-mentioned witness Manuel Abad, testified that the accused was the person who issued the poll tax certificates, and collected the amounts thereof, and referring to the certificates issued to Francisco Guimoc, Edward Llantos and Pedro Robie, numbered 481,052, 481,053 and 481,054 respectively, said that each one of these individuals paid to the defendant for the said certificates the amount of $4 Philippines currency, with the exception of Robie, who paid $6.60 and that the defendant himself wrote upon the certificates, as well as upon the stubs, the figures representing these amounts.

An examination of the forty certificates introduced during the trial and a comparison of the same with their respective stubs shows conclusively that not only the stubs numbered 481,052, 481,053 and 481,054 contain smaller amounts than those appearing on their respective certificates, but that stub No. 481,054 contains an erasure in the place where the amount had been originally written, and the figure 2 written above in pencil, and that the other thirty-five stubs contain smaller amounts than those entered on the certificates to which they belong; also, that the amounts entered upon stubs numbered 339,877, 339,852, 339,785, 339,701, 339,694, 339,673,
339,660, 339,510, 339,379, 339,313, 339,491 and 339,490
6 appear to have been erased.

Certificates numbered 339,477 and 339,445 appear to correspond with their respective stubs, with the exception of the amount

of $3 in figures, appearing on the last certificate, which has been changed to one peso, written in words.

The alteration of the figures on the stub books of poll tax certificates has been proven beyond a reasonable doubt. Two witnesses for the prosecution testified that the defendant had knowledge of such alterations, even before the complaint was filed.

Counsel for the defense made an attempt to show the innocence of the accused by introducing two witnesses, Raymundo Ebarbia and Agustin Ebarbia, the first of whom testified that he had been informed that a man by the name of Lagradilla had been dismissed by the defendant for the reason that he had made an erasure on one of the stubs. The second witness testified that he had seen Manuel Abad pour a certain liquid upon the stub of the certificate issued to Pedro Robie on the 21st of May, 1904, and rub it over the paper; that this happened upon an occasion when the treasurer left his office and stepped to the rear.

Counsel for the defense presented two other witnesses. One of them, Mariano Atienza, testified that Segundo Lagradilla stamped his certificate with the signature of the municipal treasurer. The other one, Alvaro Tabliço, testified that the said Lagradilla was the person who signed the name of the municipal treasurer to the certificate issued to him.

The court is of the opinion that the testimony of these two witnesses is not sufficient to overcome the proof introduced by the prosecution. Of these witnesses the first two testified to facts
7 which are absolutely improbable. If, as is stated by Raymundo Ebarbia, the defendant was compelled to dismiss from the service his clerk Segundo Lagradilla on account of certain erasures alleged to have been made by him upon the stub of a poll tax certificate, it does not seem clear why the defendant did not make the proper complaint to the authorities, particularly when he himself could have been made responsible therefor as municipal treasurer.

The testimony of Agustin Ebarbia to the effect that he saw Manuel Abad use the contents of a tin box for the purpose of erasing a certain figure from the stub of the certificate of Pedro Robie is most improbable. It is not possible to believe that a man who intends to commit a falsification of this nature should do it in the presence of strangers, and particularly in the presence of relatives of the municipal treasurer. The other two witnesses have furnished no evidence material to the defense, not only because the signatures alleged to have been made by the clerks are like the genuine signature of the accused, but because if the said signature had been made by the clerks the certificates introduced by the defense appear to correspond with their respective stubs, whereas, those issued and signed by the accused himself do not.

As to the stubs introduced in evidence, there is no doubt of their genuineness, and in order to convince one's self that the certificates in question have been detached from them, it would be sufficient to compare the number of its certificate with that appearing on the stub.

It cannot be presumed that the alterations made upon the stubs were made after they were taken out of the office of the accused, for the reason that the abstracts of collections presented by him to the provincial treasurer correspond with those stubs, as testified to by the provincial treasurer and his deputy, Mr. Lukembill.

8 The fact as shown by the record, that the accused changed the stubs of the poll tax certificates by entering upon them smaller amounts than those actually received for the certificates, which alterations were subsequently ratified by the defendant when he submitted his abstracts of collections showing amounts equal to those appearing on the stubs, constitutes the crime of falsification of an official document, defined and punished in paragraphs 6 and 7 of article 300 of the Penal Code.

The provisions of said section are as follows:

"The penalties of cadena temporal and a fine of from 1,250 to 12,500 pesetas shall be imposed on a public official who, taking advantage of his authority shall commit a falsification, (6) by making in a genuine document any alteration or interlineation altering its meaning; (7) by giving out an authentic copy of a fictitious document, or by stating therein a contrary or different thing from that contained in the genuine original."

There is no doubt that the accused, as municipal treasurer of Lumbang, Laguna, was a public official under the provisions of section 401 of the Penal Code, which says that all those who, either by law or by popular election or by virtue of an appointment from a competent authority, who participate in the exercise of public functions, shall be considered public officials.

That a poll tax certificate is an official document is proven by the authorities, and by the jurisprudence of the Supreme Court of Spain. Pacheco says:

"Official documents are those authorized by the government, by its agents, and by those employees who have power to make and
9 issue them in accordance with law." (Vol. 2, p. 295, 5th ed.)

"Poll tax certificates and the certificates referred to in sections 320 and 325 are also official documents, issued by public officials properly authorized." (Vol. 2, p. 434, 4th ed.)

And according to the judgment of the Supreme Court of the 23rd of September, 1890, the receipts given for taxes collected are considered public documents by their origin, their object, their form and nature; also on account of the effect they have, and the relation which they bear to other documents and books kept in the offices of the government.

Viada is of the opinion that a public official in charge of accounts who fraudulently omits to enter upon his books of account amounts received by him by reason of his office, shall be guilty of the crime of falsification just the same as though he had entered amounts smaller than those actually received. (Vol. 2, p. 388.)

This is precisely in point with the case at bar. The accused, in entering upon the stubs amounts smaller than those actually received in payment of the certificates, thus made alterations which materi-

ally changed the contents of the documents, thereby making himself amenable to the provisions of paragraph 6 of section 300 of the Penal Code. Furthermore, when the defendant certified in his abstracts of collections to the correctness of the stubs as copies of the original certificates, he committed the crime provided for in paragraph 7 of said section 309, for the reason that he certified to a document which contained statements entirely different from those contained in the original copy.

10 The Supreme Court of Spain, in its judgment of the 30th of May, 1888, has declared that any false statement made upon the stubs of a book containing receipts to be issued for payment of municipal taxes, must be considered as a falsification of an official document.

The same tribunal, in its judgment of the 2nd of January, 1891, lays down the doctrine that the stubs of receipts for taxes collected are considered official documents by reason of their origin, solemnities, effects, object and the relation they bear to the accountability of the state; that the falsification of one of these receipts involves just as much criminal responsibility as the falsification of any other public document, and that the appellant, in altering the amount shown upon the receipts, thus virtually changing their contents, committed the crime defined and punished in paragraph 6 of article 314 of the Penal Code. (Equivalent to section 300 of the Philippines Code.)

The complaint sets out various acts committed at various times, each one of which constitutes the crime of falsification, but there is some doubt in the mind of the court as to whether the prosecution intended to charge as many crimes as actually appear from the complaint, not only because the prosecuting attorney expressly says in the complaint that he charges José Paraiso with the crime of falsification, and not with various crimes of falsification, but also because in his argument he asked the court to find the accused guilty of *the* crime of falsification, and to impose upon him the penalty of sixteen years five months and eleven days imprisonment, and a fine of ten thousand pesetas, that is to say, the penalty provided for a single offense.

11 For this reason the court is of the opinion that the provisions of section 87 of the Penal Code, referring to the imposition of various penalties for different violations of the law, are not applicable to the case at bar.

Section 316 of the Penal Code provides:

"If the profit which those guilty of the falsification punished in this section may have derived, or which they proposed to gain can be estimated, there shall be imposed upon them a fine of an amount equal to three times that of such profit, unless the maximum thereof were less than the minimum penalty prescribed for the crime, in which case the latter shall be applied."

Three times the amount represented by the certificates falsified would be less than 1250 pesetas, which is the minimum fine provided for similar offenses. Therefore the fine to be imposed upon the accused should not be three times the amount actually embezzled, but the fine provided for in section 300 of the code.

There are no circumstances, either aggravating or mitigating, to be considered in this case, and the penalty should be imposed in its medium degree, in accordance with rule 1 of section 81 of the Penal Code.

Wherefore, the court finds José Paraiso guilty of the crime of falsification of an official document, and sentences him to fourteen years eight months and one day of imprisonment in Bilibid, Manila, with the accessory penalties provided for in section 56, and to pay a fine of 5,001 pesetas, or its equivalent in Philippines currency, with costs.

It is so ordered.

IGNACIO VILLAMOR,
Judge Sixth District.

12 Afterwards, to-wit, on the 4th day of November, 1904, notice of appeal was given by counsel for the defense, which said notice is in the words and figures following, to-wit:

Now comes the defendant, José Paraiso, through his attorneys, and notifies the court that, being dissatisfied with the judgment of this court, he hereby appeals to the Supreme Court of these islands from the said judgment.

Afterwards, to-wit, on the 4th day of November, 1904, bail was fixed by the Court of First Instance in the amount of 16,000 pesos, Philippines currency, by an order of which the following is a copy:

In the Court of First Instance of Laguna, Santa Cruz, Laguna, on the 4th of November, 1904, there appeared before the undersigned the defendant in this case, José Paraiso, with his attorney, Mr. Roberto Moreno, and asked the court to fix the amount of the bail to be given by the accused for his liberty during the pendency of the appeal taken from the judgment of this court.

The court, after hearing the opinion of the prosecuting attorney, orders that the amount of the bail be fixed in the sum of 16,000 pesos, Philippines currency, with sufficient sureties, before the accused can be allowed his liberty during the pendency of the appeal, as provided by law.

It is therefore ordered that upon the filing of a bond in the sum of 16,000 pesos, Philippines currency, the accused be released during the pendency of the appeal before the Supreme Court.

It is so ordered.

(Signed) IGNACIO VILLAMOR, *Judge.*

13 Afterwards, to-wit, on the — day of —— bond was given in the said amount of 16,000 pesos, Philippine currency, which was approved by the trial court.

Afterwards, to-wit, on the 15th day of November, 1904, the said cause was duly forwarded to the Clerk of the Supreme Court by letter of transmittal, which said letter of transmittal is in the words and figures following, to-wit:

Office of the Clerk of the Court of First Instance.

SANTA CRUZ, LAGUNA, P. I., *November* 15, 1904.

The Clerk of the Supreme Court, Manila, P. I.

SIR: I have the honor to forward you herewith criminal case No. 815 of this court, against José Paraiso, for the crime of falsification, by virtue of the appeal taken by the said defendant against the judgment of this court rendered therein.

Very respectfully,

(Signed) MARIANO LIM, *Clerk.*

(Endorsed:) Filed in the clerk's office of the Supreme Court of the Philippine Islands this 18th day of November, 1904. J. E. Blanco, Clerk, by H. D. McGeorge, Deputy. At 9:20 A. M.

Afterwards, to-wit, on the 18th of March, 1905, the defendant presented his brief in the Supreme Court of the Philippine Islands, accompanied by the following assignment of errors:

First Assignment of Error.

The facts alleged in the complaint do not constitute a crime.

14 *Second Assignment of Error.*

If the complaint charges any crime at all, then it charges forty different crimes.

Third Assignment of Error.

The proof introduced at the trial does not show that the accused is guilty beyond a reasonable doubt.

Afterwards, to-wit, on the 1st day of August, 1905, the Supreme Court of the Philippine Islands met in public session, and the hearing was announced of case No. 2284, the United States *v.* José Paraiso, for falsification. No counsel appeared on behalf of either side, and the case was considered as submitted, and taken under advisement.

Afterwards, to-wit, on the 20th of October, 1905, the Supreme Court of the Philippine Islands announced its decision on the merits of the said case No. 2284, the United States *v.* José Paraiso,, which said decision is in the words and figures following, to-wit:

UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

No. 2284.

UNITED STATES
vs.
JOSÉ PARAISO.

Falsification.

TORRES, *J.*:

The defendant in this case is charged with the crime of falsification of a public document, defined and penalized in subdivisions 4 and 7 of section 300 of the Penal Code.

The trial court, after considering the complaint and the proof introduced at the hearing of the case, rendered judgment on
15 the 4th of November, 1904, convicting the defendant, José Paraiso of the crime charged in the complaint, and sentenced him to the penalty of fourteen years eight months and one day of imprisonment, and to suffer the accessory penalties of section 56 of the same code, and to the payment of a fine of 5,001 pesetas, or its equivalent in Philippines currency, with costs.

It was proven during the trial of this case that the defendant, José Paraiso, was a municipal treasurer, and that he also performed the duties of deputy provincial treasurer, and that as such public official, and taking advantage of his office, he collected from some of the residents of the town of Lumbang certain sums of money in excess of the actual amount authorized by law for poll tax certificates issued to them, and failed to pay the same to the provincial treasurer; that notwithstanding this he entered upon the stubs of the said certificates smaller amounts than those actually collected, thus retaining for his own personal use a major part of the money thus collected; that in making out his abstracts of collections with reference to the stubs, he certified the same as correct, and presented them officially to the provincial treasurer, thereby committing a falsification in that he failed to state the truth in the nar-ation of the facts, and concealed the exact amounts collected by him, with intent to gain, and to this effect he made certain changes and alterations upon the stubs, in violation of the law.

This is not a case of violation of poll tax certificates, as provided in section 606 and 607 of the Penal Code.

The crime established, and that for which the defendant is directly responsible, is that of having presented an abstract of
16 collections showing amounts falsely entered upon the stubs of certain poll tax certificates, certified to as an official document, containing the amounts collected for certificates issued, upon which said abstract of collections there appear amounts smaller than those shown on the certificates issued to the tax payers.

The provincial treasurer, Mr. Lame, after explaining that the amounts shown on the abstract of collections were a resumé of the

amounts shown on the stubs, and that the total amount shown on the stubs was the only amount paid by the defendant to the treasurer, stated that the abstracts of collections that had been exhibited to him for identification were the same ones that were presented and signed by the municipal treasurer, José Paraiso.

Mr. Lame further identified the signatures appearing upon the certificates that he then had before him, he being well acquainted with the signature of the defendant, which appeared in many letters and notes that he had received from him. This witness further testified that the amounts shown on some of the certificates issued by the accused were larger than those appearing on the abstracts, referring, among others to the certificate issued to Pedro Robie, from whom the defendant received the amount of six pesos, whereas, in the stub corresponding to the said certificate, the amount of two pesos was entered. His testimony was corroborated in this respect by Manuel Abad, the clerk of the defendant, who also testified that when the provincial treasurer went to Lumbang in order to investigate the accounts of the municipal treasurer he asked the president of the municipality why the sum of six pesos had been charged for some of the certificates; this in the presence of three other persons besides himself and Mr. Lukembill, who stated that the stubs of the
17 certificates were compared by him with the abstract of collections signed by the accused Paraiso, and found those marked "A" and "H" to correspond with each other, but that the amounts entered upon some of the certificates did not correspond with their respective stubs. The treasurer, Mr. Lame, further testified that the accused had admitted to him that he had in fact issued certificates for an amount different than that appearing on the stubs, and asked him to protect him, promising that he would not do it again.

The forty certificates issued by the accused show different amounts; that is to say, six, five, four and three pesos in a majority of them, which said amounts were larger than those appearing on the corresponding stubs, and as the official abstracts made out and presented by the accused to the provincial treasurer showed smaller amounts falsely entered upon the stubs, there is no doubt that the defendant committed the crime of falsification, with intent to gain, upon the stubs of the certificates, and particularly upon the official abstracts presented to the provincial treasurer, which said crime is defined and punished in subdivisions 4 and 7 of section 300 of the Penal Code.

The defendant pleaded not guilty, and presented various witnesses, whose testimony can not, however, overcome the evidence introduced by the prosecution; nor can the two certificates exhibited by the defense have this effect, because the very fact that some of these certificates issued and signed by the accused correspond with the stubs, and the further fact that he presented an abstract as to the amounts shown on the stubs corresponding to their certificates, is the best proof of the fact that the certificates introduced in this case were genuine, and were actually issued by the accused, and not
18 by any employee of his.

As to the allegation of the defense relative to the multi-

plicity of the crimes charged in the complaint, it will be noticed that the defendant is charged with one single crime of falsification although in order to better establish the criminality of the accused it became necessary for the prosecution to make a detailed statement of the various criminal acts committed by the accused. If there was any doubt at all the defense could have excepted by demurrer to the sufficiency of the complaint in which several crimes were charged, but the fact is that neither the accused nor his counsel took advantage of any such exception, nor was any motion made to have the defendant charged with only one crime.

Therefore this is not a case in which the defendant is charged with two or more offenses, for which various penalties may be imposed, nor is it a case of various crimes punished with a single penalty, in accordance with sections 87 and 89 of the Penal Code. Consequently the provisions of section 11 of General Order 58 have not been infringed by the trial court.

The accused, José Paraiso, was charged with the crime of falsification of a public document, and notwithstanding the fact that the complaint contains various charges of falsification committed by the accused, the fact remains that no exception having been taken by the defense against the said complaint, no reason exists why the judgment appealed from convicting the defendant of a single crime, should be held defective. The judgment of the trial court is in strict conformance with the proof presented by the prosecution, as well as the defense, and the merits of the case and the law applicable thereto.

There is no doubt that the defendant is guilty, and that, as
19 has been demonstrated, had acquired the reprehensible habit of falsifying documents for the purpose of gain.

There being no aggravating or mitigating circumstances to be considered in this case, the judgment of the trial court should be confirmed, with costs to the defendant. Let the cause be returned to the trial court, with a certified copy of this decision, and also of the final judgment that may be entered in accordance therewith, for its execution.

It is so ordered.

Afterwards, to-wit, on the 23rd of October, 1905, came W. A. Kincaid, counsel for the defendant and appellant, and filed the following exception to the decision of the court, which said exception is in the words and figures following, to-wit:

UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

UNITED STATES
vs.
JOSÉ PARAISO.

Comes now the defendant and appellant, and excepts to the decision of this court affirming the judgment of the Court of First

Instance, and therefore prays the court to admit the said exception as taken in due time and form.

Manila, October 23, 1905.

(Signed) W. A. KINCAID.

(Indorsements:) Filed in the clerk's office of the Supreme Court of the Philippine Islands this 23rd day of October, 1905. J. E. Blanco, Clerk, by H. D. McGeorge, Deputy, at 9:35 a. m.

Afterwards, to-wit, on the 23rd of October, 1905, the Supreme Court made an order admitting the exception filed by the defendant and appellant against the decision of the said court, which said order is in the words and figures following, to-wit:

20 Report having been made upon the petition filed by attorney Kincaid excepting to the decision of this court in case No. 2284, United States *v.* José Paraiso, affirming the judgment of the Court of First Instance of Laguna,

Ordered by the court that the said exception be admitted and allowed as taken in due time and form, and let the same be attached to the record of the case.

Afterwards, to-wit, on the 30th of October, 1905, the following petition was filed by W. A. Kincaid, counsel for defendant and appellant, asking for a rehearing, which said petition is in the words and figures following, to-wit:

In the Supreme Court of the Philippine Islands.

THE UNITED STATES, Plaintiff and Appellee,
versus
JOSÉ PARAISO, Defendant and Appellant.

Motion for Rehearing.

Comes the defendant and appellant in the above-entitled cause, and moves the court to grant him a rehearing for the following reasons:

I.

The defendant has been required to answer to a criminal charge without being advised of the nature and cause of the accusation against him.

II.

The defendant has been convicted of a crime without due
21 process of law.

III.

The defendant has been convicted of the crime of falsification of a public document without any accusation having been presented against him for said offense.

IV.

The defendant has been convicted of the crime of falsification of a public document upon a complaint which did not advise him of the nature and cause of the accusation against him.

I shall present an extended argument in support of this motion within the next two or three days.

Manila, P. I., October 30, 1905.

(Signed) W. A. KINCAID,
Attorney for the Appellant.

(Indorsed:) Filed in the Clerk's Office of the Supreme Court of the Philippine Islands this 30th day of October, 1905. J. E. Blanco, Clerk, by H. D. McGeorge, Deputy, at 11.25 a. m.

Afterwards, to-wit, on the 27th day of November, 1905, the following order was made by the Supreme Court denying the motion for a rehearing, which said order is in the words and figures following, to-wit:

The Court, after considering the petition presented by attorney Kincaid asking for a rehearing upon the decision rendered in case No. 2284, the United States *v.* José Paraiso, for the crime of falsification, ordered that the motion for a rehearing be denied.

Afterwards, to-wit, on the 29th of November, 1905, the de-
22 fendant and appellant, through his attorney, W. A. Kincaid, excepted to the order of this court denying his motion for a rehearing upon the decision rendered in this case, which said exception is in the words and figures following, to-wit:

UNITED STATES, Plaintiff and Appellee,
v.
JOSÉ PARAISO, Defendant and Appellant.

Now comes the defendant and appellant, and excepts to the order of this court entered on the 27th of this month, denying the petition for a rehearing upon the decision of this court in the above-entitled cause, and asks the court to allow the said exception as taken in due time and form.

Manila, November 29, 1905.

W. A. KINCAID,
Attorney for Defendant and Appellant.

Afterwards, to-wit, on the 1st of December, 1905, the following order was made by the court:

Report having been made upon the exception filed by attorney Kincaid to the order of this court entered on the 27th of November last, denying his motion for a rehearing upon the decision of this court in case No. 2884, United States *v.* José Paraiso, it is ordered that the exception be allowed and filed with the records of this case.

Afterwards, to-wit, on the 5th of December, 1905, the following judgment was entered, to-wit:

UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

UNITED STATES OF AMERICA, Plaintiff and Appellee,
v.
JOSÉ PARAISO, Defendant and Appellant.

Judgment December 5, 1905. Judgment Book No. 3. No. 2284.

The court having regularly acquired jurisdiction for the trial of the above-entitled cause submitted by both parties for decision, after consideration thereof by the court upon the record, its decision and order for judgment having been filed on the 28th of September, A. D. 1905,

23 By virtue thereof it is hereby adjudged and decreed that the judgment of the Court of First Instance of Laguna, dated the 4th day of November, 1904, and from which the above-entitled appeal was taken, be and the same is hereby affirmed, with the costs to the defendant, which said costs amount to $12 United States currency.

It is further ordered that the said cause be remanded to the Court of First Instance for the corresponding effect.

[Seal of the Supreme Court.]

(Signed) J. E. BLANCO,
Clerk of the Supreme Court
of the Philippine Islands.

Afterwards, to-wit, on the 5th day of December, 1905, there was filed in the clerk's office of said court in the above-entitled cause, an exception to the final judgment entered therein, said exception being in the words and figures following, to-wit:

UNITED STATES
v.
JOSÉ PARAISO.

Now comes the defendant and appellant, and excepts to the final judgment entered in the above-entitled cause, and asks the court to allow the said exception as taken in due time and form.

Manila, December 5, 1905.

W. A. KINCAID,
Counsel for Defendant and Appellant.

Afterwards, to-wit, on the 7th of December, 1905, an order was made by the Supreme Court allowing the exception taken by the defendant to the final judgment in said cause, which order is in the words and figures following, to-wit:

Report having been made upon the exception of attorney Kincaid to the final judgment entered in case No. 2284, United States *v.* José Paraiso, for the crime of falsification, it was ordered by the court that said exception be allowed and filed with the records of the said case.

24 Afterwards, to-wit, on the 9th day of December, 1905, there was filed in the clerk's office of said court in the above-entitled cause, a petition for a writ of error, said petition being in the words and figures following, to-wit:

UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

The UNITED STATES, Plaintiff and Appellee,
versus
JOSÉ PARAISO, Defendant and Appellant.

Comes José Paraiso, defendant and appellant in the above-entitled cause, and represents:

I.

That judgment has been rendered in said cause by which a judgment of the Court of First Instance convicting petitioner for the offense of falsification of a public document has been affirmed in violation of the Philippines Bill as appears from the accompanying assignment of errors.

II.

Wherefore, petitioner prays that he be granted a writ of error from the Supreme Court of the United States to the Supreme Court of these Islands with a supersedeas of the judgment, and that upon the execution and approval of a bond in such sum as may be deemed sufficient, conditioned as required by law, he be admitted to bail pending such writ of error, in order that the judgment may be revised by the Supreme Court of the United States upon the
25 assignment of errors presented with this petition.

He also prays that the record of the cause be ordered translated from Spanish to English in conformity with the rule prescribed by the Supreme Court of the United States.

W. A. KINCAID,
Attorney for Petitioner.

(Indorsed:) Filed in the Clerk's office of the Supreme Court of the Philippine Islands this 9th day of December, 1905. J. E. Blanco, Clerk of the Supreme Court of the Philippine Islands, *ex-officio* notary public.

Afterwards, to-wit, on the 9th day of December, 1905, there was filed in the clerk's office of said court an assignment of errors in said

cause, which said assignment of errors is in the words and figures following, to-wit:

In the Supreme Court of the United States.

In the Matter of the Petition of José Paraiso, Plaintiff in Error,
versus
The United States, Defendant in Error.

Assignment of Errors.

Comes José Paraiso, and says that in the record and proceedings in the above-entitled case there is manifest error in this, to-wit:

I.

It appears that José Paraiso has been required to answer to a criminal offense without being advised of the nature and cause of the accusation against him.

26 II.

It appears that José Paraiso has been convicted of the crime of falsification of a public document without due process of law.

III.

It appears that José Paraiso has been convicted of the crime of falsification of a public document without any accusation having been presented against him for such offense.

IV.

It appears that José Paraiso has been convicted of the crime of falsification of a public document upon an information that did not advise him of the nature and cause of the accusation against him.

Wherefore, the said José Paraiso prays that the judgment of the Supreme Court of the Philippine Islands be reversed and the case remanded to that court, with instructions to dismiss the prosecution against him.

W. A. KINCAID,
Attorney for Plaintiff in Error.

(Indorsed:) Filed in the Clerk's office of the Supreme Court of the Philippine Islands this 9th day of December, 1905. J. E. Blanco, Clerk of the Supreme Court of the Philippine Islands, *ex-officio* notary public.

27 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Judges of the Supreme Court of the Philippine Islands, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the Philippine Islands, before you, or some of you, between The United States, plaintiff and appellee, and José Paraiso, defendant and appellant, a manifest error hath happened to the great damage of the said José Paraiso, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, we command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the seventh day of February 1906, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice
28 of the Supreme Court of the United States the ninth day of December in the year of our Lord, 1905.

[Seal Corte Suprema, Islas Filipinas.]

J. E. BLANCO,
Clerk of the Supreme Court of the Philippine Islands.

The foregoing writ of error is allowed and it shall operate as a supersedeas of the judgment complained of, and upon the execution of a bond by José Paraiso in the sum of fifteen thousand pesos payable to the defendant in error, conditioned as required by law, to be approved by me, he shall be entitled to his liberty pending such writ of error.

FLORENTINO TORRES,
Associate Justice of the Supreme Court of the Philippine Islands.

Filed in the Clerk's office of the Supreme Court of the Philippine Islands this 9th day of December, 1905.

J. E. BLANCO,
Clerk of the Supreme Court of the Philippine Islands, Ex-officio Notary Public.

UNITED STATES OF AMERICA, *Philippine Islands:*

UNITED STATES, Plaintiff and Appellee,
v.
JOSÉ PARAISO, Defendant and Appellant.

PHILIPPINE ISLANDS, *City of Manila, ss:*

Whereas, José Paraiso, defendant and appellant in the above-entitled cause, was convicted by the Supreme Court of the Philippine Islands of the crime of falsification of a public document, and a writ of error having been allowed from the Supreme Court of the United States to the Supreme Court of the Philippine Islands to reverse the said judgment; and

Whereas, by an order made by the Honorable Florentino Torres, a justice of the said Supreme Court of the Philippine Islands, who allowed the said writ of error, the said José Paraiso has been allowed bail during the pendency of the said writ of error, upon the filing of a bond in the sum of 15,000 pesos,

Now therefore, we, José Paraiso as principal, and Ponciano Rees and Wenceslao Tabia as sureties, jointly and severally hereby undertake that the said José Paraiso shall pay the fine that the Supreme Court of the United States may direct, and that he shall present himself for judgment, and that in the event the said cause shall be remanded for a new trial he will appear before the court to which the cause may be remanded, and will obey the orders and processes of the same, and that in case of failure to comply with any or all of the said conditions, will pay to the United States the amount of 15,000 pesos.

In witness whereof, we have signed these presents on the 14th day of December, 1905.

(Signed) JOSÉ PARAISO.
PONCIANO REYES.
WENCESLAO TABIA.

PHILIPPINE ISLANDS, *City of Manila, ss:*

Before me, the undersigned authority, on this date appeared personally Ponciano Reyes and Wenceslao Tabia, and declared under oath that they are the persons whose names are subscribed to the foregoing bond, and that they own real property in the Philippine Islands, and that each of them is worth the amount specified in the undertaking, over and above all just debts and obligations and property exempt from execution.

(Signed) PONCIANO REYES.
WENCESLAO TABIA.

Subscribed and sworn to before me by Ponciano Reyes and Wenceslao Tabia this 14th day of December, 1905. Ponciano Reyes exhibited registration certificate No. A781, dated Manila, January 3,

1905, and Wenceslao Tabia registration certificate No. A368933, issued at Lumbang, Laguna, March 1, 1905.

[SEAL.] ROBERTO MORENO,
Notary Public.

PHILIPPINE ISLANDS, *City of Manila, ss:*

I, J. E. Blanco, Clerk of the Supreme Court of the Philippine Islands, do hereby certify that Wenceslao Tabia, one of the sureties named in the foregoing bond, exhibited to me for the purpose of proving that he was worth the amount specified herein, the following receipts issued by the provincial treasurer of Laguna, during the month of May, 1905, wherein the assessed value of his property appeared as follows:

31 No. 700151, $663; No. 700291, $1127; No. 700292, $462; No. 700279, $273; No. 700290, $452; No. 700171, $1,393; No. 700167, $433; No. 700168, $392; No. 700165, $353; No. 700163, $289; No. 700164, $271; No. 700161, $319; No. 700162, $224; No. 700166, $176; No. 700230, $384; No. 700229, $585; No. 700169, $251; No. 700174, $201; No. 700154, $108; No. 700170, $116; No. 700160, $173; No. 700152, $92; No. 700172, $98; and Ponciano Reyes receipt No. 7993, $16,000, dated January 30, 1905.

In witness whereof, I have signed these presents, together with the said sureties, this 29th day of December, 1905.

[Seal of Supreme Court.]

(Signed) BLANCO,
Clerk Supreme Court, P. I.

(Signed) WENCESLAO TABIA.
PONCIANO REYES.

The foregoing bond is hereby approved.

(Signed) FLORENTINO TORRES,
Justice of the Supreme Court of the Philippine Islands.

32 THE UNITED STATES OF AMERICA, *ss:*

To Attorney General for the Philippine Islands:

You are hereby cited and admonished to be in and appear at the Supreme Court of the United States, to be holden at Washington, within sixty days from the date of this citation, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the Philippine Islands, wherein José Paraiso, is plaintiff in error and the United States defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the

Supreme Court of the United States, this ninth day of December in the year of our Lord, 1905.

[Seal Corte Suprema, Islas Filipinas.]

FLORENTINO TORRES,
Associate Justice of the Supreme Court of the Philippine Islands.

I admit the receipt of a copy of the above citation and accept service thereof as though regularly had this — day of — 190-.

L. R. WILFLEY,
Attorney General for the Philippine Islands.

Filed in the Clerk's office of the Supreme Court of the Philippine Islands this 9th day of December, 1905.

J. E. BLANCO,
Clerk of the Supreme Court of the Philippine Islands, Ex-officio Notary Public.

33 In the Supreme Court of the United States.

José Paraiso, Plaintiff in Error,
versus
The United States of America, Defendant in Error.

It is hereby agreed by the parties in the above entitled cause that the decisions of the Court of First Instance and Supreme Court of the Philippine Islands express sufficient facts to an understanding of the questions raised on the Writ of Error with the single exception that it is shown by the record transmitted to the Supreme Court of the Philippine Islands from the Court of First Instance, that the defendant, before any evidence had been received, prayed the Court of First Instance for leave to withdraw his plea of not guilty and substitute it with the statement that he did not know how to plead, which request was denied by the Court and the plea of not guilty ordered to stand.

And that it further appears that the defendant objected to the reception of any evidence in support of the complaint because it was incapable of being sustained by evidence which objection was overruled.

This being so the Clerk may omit from the return to the Writ of Error the evidence tak*ing* on the trial in the Court of First Instance.

Manila, P. I., Feb. 19, 1906.

W. A. KINCAID,
Attorney for the Plaintiff in Error.
L. R. WILFLEY,
Attorney General of the Philippine Islands.

34 PHILIPPINE ISLANDS, *City of Manila, ss:*

I, J. E. Blanco, Clerk of the Supreme Court of the Philippine Islands, do hereby certify that the foregoing 33 pages of typewritten matter contain a complete transcript in English of the record and proceedings had in the case of José Paraiso, plaintiff in error, *v.* the United States of America, defendant in error, with the exception of the testimony taken and the exhibits introduced in the trial court.

In witness whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of the Philippine Islands, this 24th day of February, 1906.

[Seal Corte Suprema, Islas Filipinas.]

J. E. BLANCO,
Clerk Supreme Court, P. I.

Endorsed on cover: File No. 20,220. Philippine Islands supreme court. Term No. 270. Jose Paraiso, plaintiff in error, *vs.* The United States. Filed April 24th, 1906. File No. 20,220.

Office Supreme Court, U. S.
FILED
APR 4 1907
JAMES H. McKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. [redacted]23

JOSE PARAISO, PLAINTIFF IN ERROR,

vs.

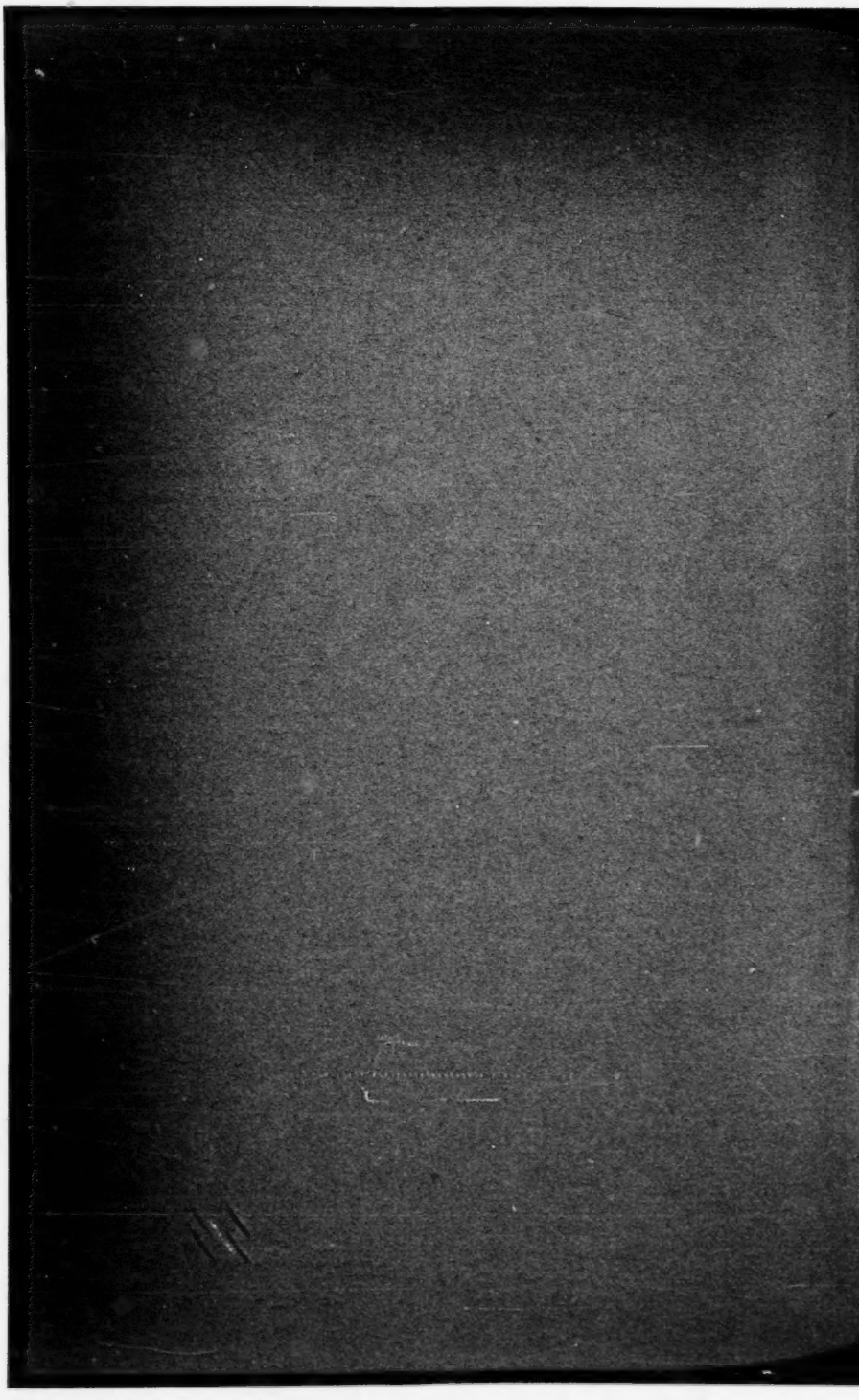
THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

REPLY TO MOTION TO DISMISS OR AFFIRM.

ALDIS B. BROWNE,
ALEX. BRITTON,
Counsel for Plaintiff in Error.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. [redacted]



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 270.

JOSE PARAISO, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

REPLY TO MOTION TO DISMISS OR AFFIRM.

I.

The writ of error issued as of right. Its basis is the claim that the judgment below stands in conflict with the Philippine Bill of Rights. If such claim be found erroneous, affirmance of the judgment follows, but not dismissal of the writ.

II.

It is true that this court, at the present term, in *Serra and Obleno v. Mortiga* (204 U. S., 270), decided that the Philippine Supreme Court did not err in holding that the objection to the sufficiency of the complaint as violating

the guarantees of the statutory Bill of Rights could not be raised for the first time in that appellate court. Necessarily, the decision in that case is controlling here to the extent so ruled.

But there is in this record (p. 20) express stipulation resting the facts upon the statement thereof appearing in the decisions of the courts below and adding thereto the following:

> "And that it further appears that the defendant objected to the reception of any evidence in support of the complaint because it was incapable of being sustained by evidence which objection was overruled."

Despite this somewhat inartificial statement, we submit its meaning is sufficiently plain, as necessarily involving the contention that the complaint was insufficient on which to proceed to trial. Could it have other meaning? Adapted to common law formula, it meant demurrer to the sufficiency of the complaint. The statement, measured by the softer cadence of language prevailing in this far-off possession, can hence only be given the same legal effect. In that view, it must follow that the objection was seasonably raised in the trial court and overruled; was before the appellate court (for the entire record was certified thereto from the trial court, R. 8), and that the appellate court erred in ruling (R., 11) either that no objection was raised against the complaint or in ignoring the effect of defendant's demurrer, as expressed by the language of the stipulation *supra*.

III.

The trial court found the plaintiff in error guilty of the crime of falsification of an official document by the alteration of the stubs of certain poll-tax certificates, whereby a lesser sum than called for in such certificates was substituted

on the stub thereof and settlement made with the provincial treasurer upon the basis of such altered and lesser amounts. That court ruled the offense as—

> "defined and punished in paragraphs 6 and 7 of article 300 of the Penal Code."
>
> "The provisions of said section are as follows:
>
> " 'Ten penalties of *cadena temporal* and a fine of from 1,250 to 12,500 pesetas shall be imposed on a public official who, taking advantage of his authority shall commit a falsification, * * * (6) by making in a genuine document any alteration or interlineation altering its meaning; (7) by giving out an authentic copy of a fictitious document, or by stating therein a contrary or different thing from that contained in the genuine original' " (R., 5).

The court further held (R., 6):

> "Section 316 of the Penal Code provides:
>
> " 'If the profit which those guilty of the falsification punished in this section (title) may have derived, or which they proposed to gain can be estimated, there shall be imposed upon them a fine of an amount equal up to three times that of such profit, unless the maximum thereof were less than the minimum penalty prescribed for the crime, in which case the latter shall be applied.'
>
> "Three times the amount represented by the certificates falsified would be less than 1250 pesetas, which is the minimum fine provided for similar offenses. Therefore the fine to be imposed upon the accused should not be three times the amount actually embezzled, but the fine provided for in section 300 of the code."

And its action in this regard was affirmed by the Supreme Court (R., 9-11).

The error, therefore, is manifest. Section 316 clearly provides that where the fine "of an amount equal to three times that of such profit" is less than the minimum penalty prescribed for the crime, then and in *that* case the latter, to wit,

the *minimum* penalty, shall be applied. But the trial court, although expressly finding that three times the amount represented by the certificates falsified would be less than 1,250 pesetas, which, as its decision states, "is the minimum fine provided for similar offenses," proceeded to impose a fine of 5,001 pesetas, or four times the amount of the minimum fine clearly applicable to the offense by the court's own statement of the law. The error is so manifest as not to require discussion. In such erroneous application of the law the court therefore plainly denied this plaintiff in error both due process and "the equal protection of the law."

That error is reviewable here; otherwise the plaintiff in error is without remedy.

It matters not that the errors assigned (R., 16) may be concluded by the recent decision in *Serra & Obleno v. Mortiga, supra,* because the objections they cover were not raised in the trial court. The *right* to the writ of error in that case stood upon the precise ground urged in this. The court did not dismiss the writ of error in the *Serra* case, however, but affirmed the judgment. If in that case other plain error appeared, full jurisdiction to reverse the judgment therein existed, for the court may notice a plain error not assigned. *Here* we point plain error which affects the fundamental rights of this plaintiff in error. Having jurisdiction of the entire cause, such error may, we submit, be reviewed and the judgment corrected.

IV.

While the record does not clearly indicate the exact amount which the plaintiff in error was charged to have thus appropriated, the decision of the trial court *supra* does expressly state that—

> "three times the amount represented by the certificates falsified would be less than 1,250 pesetas * * *."

Hence the amount thus charged to have been wrongfully appropriated by him certainly could not have exceeded the one-third part of 1,250 pesetas, or 416 pesetas, equal to $200, and was in fact much less; yet mark the sentence of the trial court, which has been affirmed in the Supreme Court (R., 7), to wit:

> "Wherefore, the court finds Jose Paraiso guilty of the crime of falsification of an official document, and sentences him to *fourteen years eight months and one day* of imprisonment in Bilibid, Manila, with the accessory penalties provided for in section 56, and to pay a *fine of 5,001 pesetas,* or its equivalent in Philippines currency, with costs."

The provision of the Philippines Statutory Bill of Rights (32 Stats., p. 693) is—

> "that excessive bail shall not be required nor excessive fine imposed, nor cruel and unusual punishment inflicted."

It clearly appears under Point III, *supra,* that an excessive fine has been imposed upon this plaintiff in error by the lower court's erroneous application of the section of the Philippines Code above quoted, and on which ground alone review in this court is fully justified; but it is also plain that a fine of 5,001 pesetas is certainly and at least *more than twelve times* the amount of his alleged peculation. No argument is needed to demonstrate that in simple justice this *is* an excessive fine and wholly out of proportion to the offense charged.

The case, we submit, therefore, is rightly within the jurisdiction of this court, because (1) by the plain misapplication of the Philippine Penal Code an unlawful fine has been imposed, far beyond the amount clearly prescribed thereunder for the offense charged, and (2) because the amount of fine actually imposed is in every view excessive to the last degree. The sentence is even more obnoxious and

cruel in its imposition of imprisonment for fourteen years eight months and one day for what in effect is the alleged unlawful appropriation of less than 400 pesetas, or $200, expressed in American money.

In *Trono et al. v. United States* (199 U. S., 521) this court affirmed the sentence of the Supreme Court of the Islands against Trono for the same exact period of time as is imposed in present case, although Trono was convicted by the Supreme Court of the Islands "of the crime of homicide (in substance, murder in the second degree)," to use the exact language of this court (p. 252).

Can it possibly be said that the crime for which this plaintiff in error was convicted, namely (and stated in practical form), the falsification of a record to his gain in the possible maximum sum of $200, justifies a sentence of imprisonment for the exact term imposed in the Trono case for "the crime of homicide (in substance, murder in the second degree)"? The statement of the proposition carries its strongest argument and, we respectfully submit, its own condemnation.

How can imprisonment for such an extended period, for such an offense, be ranked, in respect of term, with punishment for the crime of homicide or murder without violating in the plainest way the prohibition of the Philippine Bill of Rights against cruel and unusual punishment?

We respectfully submit that the language of the prohibition cannot be confined only to the *form* of punishment. In carrying our free institutions to the Philippines, how can such injustice be recognized, when upon the mainland such duration of punishment for the offense of which this plaintiff in error has been convicted could never be so ranked with punishment for the crime of homicide?

In *O'Neill v. Vermont,* 144 U. S., 323, this court declined to consider the case for want of jurisdiction, but the extreme punishment of imprisonment inflicted upon O'Neill by the courts of Vermont was made the basis of the strong dissenting opinions delivered by Justices Field and Harlan.

Mr. Justice Harlan's opinion concludes with the statement that "Mr. Justice Brewer authorizes me to say that in the main he concurs with the views expressed in this opinion."

We respectfully ask consideration of those dissenting opinions (pp. 359-366 and 370-371) because stating in much abler language than counsel can employ the broad sweep of this question in its plain application to the case at bar.

V.

We take no issue with the Solicitor General in his effort to discourage removal into this court of cases wherein the writ is taken upon obviously frivolous grounds, or where the questions sought to be raised thereunder have been heretofore distinctly and finally ruled; but in present case, we submit, plain error appears. The writ is hence founded on solid ground. Assuredly no cases can be here presented overshadowing in importance the liberty of human beings, who while they may not be citizens of the United States, yet live under our flag and are hence all the more entitled to full protection in respect of the inalienable rights of life, liberty, and property which the fathers enjoyed long before written Constitutions were framed, and which beneficient provisions have been bestowed upon the inhabitants of our antipodean possessions by express enactment.

Serra & Obleno v. Mortiga, supra.

VI.

We submit, the motion to dismiss or affirm should be denied.

Respectfully submitted,

ALDIS B. BROWNE,
ALEX. BRITTON,
Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 23.

JOSE PARAISO, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

Plaintiff in error was arraigned and tried in the Court of First Instance of the province of Laguna, upon complaint of information of the provincial fiscal, for the crime of falsification, alleged to have been committed in the alteration of certain official records made and kept by him in his capacity as municipal treasurer of the town of Lumbang and to his gain in the maximum sum of $200. He was tried without jury, found guilty, and sentenced by the trial court to imprisonment for fourteen years eight months and one day, with the accessory penalties provided for in section 56, of the Penal Code, and to pay a fine of 5,001 pesetas, or its equivalent in Philippine currency, with costs (R., 1, 2, 7). On

appeal, this sentence and judgment was affirmed in the Supreme Court of the Islands (R., 9-11). From that judgment this writ of error is taken.

Motion to dismiss or affirm was submitted at the last term, but consideration thereof postponed until hearing of the case upon the merits.

Assignment of Errors.

The errors assigned, which accompany the writ of error, are (R., 16):

I.

It appears that Jose Paraiso has been required to answer to a criminal offense without being advised of the nature and cause of the accusation against him.

II.

It appears that Jose Paraiso has been convicted of the crime of falsification of a public document without due process of law.

III.

It appears that Jose Paraiso has been convicted of the crime of falsification of a public document without any accusation having been presented against him for such offense.

IV.

It appears that Jose Paraiso has been convicted of the crime of falsification of a public document upon an information that did not advise him of the nature and cause of the accusation against him.

Additional errors are here assigned, as follows:

V.

The fine imposed is unlawful in amount.

VI.

Both the sentence of imprisonment and fine imposed are violative of the Philippine Bill of Rights (32 Stats., 693), which provides—

> "that excessive bail shall not be required, nor excessive fine imposed, nor cruel and unusual punishment inflicted."

I.

Jurisdiction.

Supplementing our reply to the motion to dismiss or affirm filed at the last term, we submit:

The entire record of the cause was before the Supreme Court below. The transcript of record here embraces only the original complaint or information and the findings and decision of both the trial and appellate court, with the assignment of errors in the latter court, but is accompanied with the following express stipulation (R., 20):

> "It is hereby agreed by the parties in the above-entitled cause that the decisions of the Court of First Instance and Supreme Court of the Philippine Islands express sufficient facts to an understanding of the questions raised on the writ of error with the single exception that it is shown by the record transmitted to the Supreme Court of the Philippine Islands from the Court of First Instance that the defendant, before any evidence had been received, prayed the Court of First Instance for leave to withdraw his plea of not guilty and substitute it with the statement that he did not know how to plead; which request was denied by the court and the plea of not guilty ordered to stand.
>
> "And that it further appears that the defendant objected to the reception of any evidence in support of the complaint because it was incapable of being sustained by evidence; which objection was overruled.

> "This being so, the clerk may omit from the return to the writ of error the evidence taken on the trial in the Court of First Instance.
>
> "MANILA, P. I., *Feb.* 19, 1906."

From this stipulation, it is plain that the defendant in the trial court in legal effect demurred to the sufficiency of the complaint, which objection was overruled. If the trial court erred in such action, then it is plain that the plaintiff in error was tried and convicted without due process of law, notwithstanding the guarantee thereof expressly given by section 5 of the act approved July 1, 1902 (32 Stats., 691), providing for temporary civil government in the Philippine Islands. As the entire record was before the Supreme Court below, showing his demurrer to the sufficiency of the complaint, and that such objection was overruled by the trial court, it is manifest that the Supreme Court both upon the record and the formal assignments of error (R., 8, 16), advisedly ruled that point against him by its opinion and judgment of affirmance.

Now, by section 10 of the act of July 1, 1902, *supra,* (32 Stats., 691, 695), it is provided:

> "That the Supreme Court of the United States shall have jurisdiction to review, revise, reverse, modify, or affirm the final judgments and decrees of the Supreme Court of the Philippine Islands in all actions, cases, causes, and proceedings now pending therein or hereafter determined thereby in which the Constitution or any statute, treaty, title, right, or privilege of the United States is involved, * * * and such final judgments or decrees may and can be reviewed, revised, reversed, modified, or affirmed by said Supreme Court of the United States on appeal or writ of error by the party aggrieved, in the same manner, under the same regulations, and by the same procedure, as far as applicable, as the final judgments and decrees of the circuit courts of the United States."

There was hence involved in the present case the direct application of the Philippine statute or Bill of Rights, *supra,* by defendant's objection to the sufficiency of the information, determination thereof adversely to him in the trial court, and express affirmance of that court's action in the Supreme Court below. How, then, upon this record, could these statutory guarantees be more directly involved or more clearly expressed? We are not unmindful of the rule declared in the cases cited upon the Government's brief, in support of the motion to dismiss, that the constitutional or other claim of jurisdiction must be real and substantial, embodying "fair color," in order to justify review in this court. But it will be noted that, upon a substantially like record, this court at the last term, in *Serra v. Mortiga,* 204 U. S., 470, on writ of error to the Supreme Court of the Philippine Islands, reviewed the judgment below, deciding broadly the question of "[redacted]" therein raised, and affirmed the judgment below in holding that the objection to the sufficiency of the complaint, when not made in the trial court, could not be considered upon appellate review. The case at bar stands, in this regard, upon much stronger ground, when it so plainly appears by the record that the fundamental objection to the sufficiency of the complaint was seasonably raised and overruled by the trial court. Indeed, it may well be added that in the case of *Arkansas v. Schlierholz* (179 U. S., 598, 601), cited upon the Government's brief, the court, in legal effect, clearly ruled in harmony with our contention, when it said:

> "Clearly, therefore, the record presents no constitutional question for review by this court, since it fails to disclose that a controversy on such subject was called to the attention of the court below prior to the hearing, and when it also does not appear that the court below considered or necessarily passed upon an issue of that character."

For in the present case the sufficiency of the complaint was directly challenged in the trial court; was there overruled,

and its action in terms affirmed by the Supreme Court below (R., 11). Under the Circuit Court of Appeals act of March 3, 1891 (section 5), the jurisdiction of this court by direct appeal or writ or error from the circuit courts of the United States arises (*inter alia*) where the construction or application of the Constitution or federal statute is presented; but under section 10 of the Philippine act of July 1, 1902, *supra,* the jurisdiction for review in this court extends to cases "in which the Constitution or any statute, treaty, title, right, or privilege of the United States *is involved* * * *." Under the plain record facts in the present case, the guarantees of section 5 of the same act would be violated if, as matter of law, this plaintiff in error was arraigned, tried, and convicted under a complaint so insufficient as to be violative of the rights there guaranteed. *That* is the question for review which this record presents, and necessarily that statute, as a statute of the United States, is so here involved. In other words, this court has often ruled that a cause may be here so reviewed, when taking the record by its four corners, it is apparent that the judgment below could not have been rendered without expressly or impliedly ruling upon a question of federal nature. Certainly, then, in the present case, involving human liberty, and upon this record, no strained construction, such as that for which the Government contends, should be indulged, nor the plaintiff in error denied relief upon his writ of error if, tested by the federal statute, judicial error has been committed against him in the courts below.

The objection to the sufficiency of the complaint as matter of law, having been raised before trial, was certainly seasonably made. It would have been in ample time if presented after trial in arrest of judgment. Such is the settled rule, as well expressed by Chief Justice Marshall in *Slacum v. Pomery* (6 Cranch, 221, 225), thus:

> "Had this error been moved in arrest of judgment, it is presumable the judgment would have been ar-

> rested; but it is not too late to allege, as error, in this court, a fault in the declaration, which ought to have prevented the rendition of a judgment in the court below."

This case has been often cited and the rule reaffirmed in this court. Surely it has just application to the case at bar in demonstrating jurisdiction here, especially when, as this record clearly shows, the objection to the sufficiency of the complaint was raised by this plaintiff in error upon his original trial.

II.

The Merits.

A.

Insufficiency of Information.

The complaint or information (R., 1-2) avers as follows:

> "The undersigned accuses Jose Paraiso of the crime of falsification, committed as follows: That the said Jose Paraiso, in his capacity as municipal treasurer of Lumbang, entered upon registration tax certificate No. 481,054, issued at Lumbang the 31st of May, 1904, to one Pedro Robie, the amount of $6.00, and erased from the stub thereof the figures written thereon, with the exception of the two -00, leaving traces of the figure thus erased, there appearing, however, upon the same stub, written in pencil by the accused, the figures 2.00, this being the amount shown on the abstract submitted to the provincial treasurer, all of this with the intent of gain.
>
> "That on registration tax certificate No. 481,052, issued at Lumbang on the 31st day of May, 1904, to Francisco Guimoc, he entered the amount of $4 as the price of said certificate, whereas on the stub thereof he only entered the amount of $2, thereby

committing the crime of falsification of a document, provided for and penalized under paragraphs 4, 6, and 7 of section 300 of the Penal Code. It further appears from the abstract submitted by him that the amount received was $2.00, thus defrauding the Government to his personal advantage and gain.

"That at different times during the year 1904, in his capacity as municipal treasurer of the town of Lumbang, Laguna, he issued registration tax certificates to the following persons, under the following numbers"

(Then follows the description by name and number of 38 certificates:)

"upon which said certificates there appear to have been entered and collected by the accused larger amounts than those shown on their corresponding stubs after he had settled his accounts with the provincial treasurer; and that the said stubs, or most of them, contain erasures, changes, and alterations, all of which said acts are punishable under paragraphs 4, 6, and 7 of section 300 of the Penal Code, relating to the crime of falsification, for the purpose of gain."

The express charge is:

1. That upon the *stubs* of the two certificates specifically named in paragraphs 1 and 2 he erased and altered the figures originally shown thereon and placed the lesser amount on the abstract submitted to the provincial treasurer.

2. In respect of the 38 certificates named in paragraph 4, there appear *on such certificates* larger amounts than those shown on their corresponding stubs after he had settled his accounts with the provincial treasurer, and that the said stubs or most of them contain "erasures, changes, and alterations" * * *.

In respect of these 38 certificates it is manifest that there is utter absence of such specific facts in respect of dates or

amounts as to wholly fail to properly advise the accused. Standing alone, such pleading could not, we submit, by any fair or just rule of criminal pleading, be held sufficient to compel the accused to make answer or to advise him in any proper sense of the accusation with that exact clearness which the law requires. He did not possess the certificates. They had been issued to and delivered to the individuals named. What amount each called for was not stated and what amount was shown upon "the corresponding stubs." What stubs contained "erasures, changes, and alterations" and what they were is not stated. The information simply says "that the said stubs, or most of them, contain erasures, changes, and alterations."

So, in respect of the first certificate mentioned, *alteration* of the figures upon the corresponding stub is charged, while upon the second the charge is that he originally entered upon the stub only one-half of the amount entered upon the original certificate.

The information concludes:

> "all of which acts are punishable under paragraphs 4, 6 and 7 of section 300 of the Penal Code, relating to the crime of falsification, for the purpose of gain" (R., 2).

The trial court decided (R., 5) that upon the proof the offense committed was—

> "that the accused changed the stubs of the poll-tax certificates by entering upon them smaller amounts than those actually received for the certificates, which alterations were subsequently ratified by the defendant when he submitted his abstracts of collections showing amounts equal to those appearing on the stubs, constitutes the crime of falsification of an official document, defined and punished in paragraphs 6 and 7 of article 300 of the Penal Code."

But the Supreme Court of the Islands held him guilty under paragraphs 4 and 7 of article 300, its language being (R., 10):

> "The forty certificates issued by the accused show different amounts; that is to say, six, five, four and three pesos in a majority of them, which said amounts were larger than those appearing on the corresponding stubs, and as the official abstracts made out and presented by the accused to the provincial treasurer showed smaller amounts falsely entered upon the stubs, there is no doubt that the defendant committed the crime of falsification, with intent to gain, upon the stubs of the certificates, and particularly upon the official abstracts presented to the provincial treasurer, which said crime is defined and punished in subdivisions 4 and 7 of section 300 of the Penal Code."

Clearly, then, the two lower courts *differed* as to the definition of the crime, the lower court holding paragraphs 6 and 7 to have been violated and the higher court paragraphs 4 and 7. Tested by the information *without* the proof, how, then, could the accused be expected to know under what paragraphs he was rightly accused, when the courts which tried him could not agree? If the courts thus differed upon both the information and the proof as to the nature and cause of the accusation, can it be said that the accused was apprised from the information alone with that legal certainty which the humanity of the law requires?

The paragraphs under which he was convicted by the trial court (6 and 7) provide:

> "6. By making in a genuine document any alteration or interlineation altering its meaning."

But that was rejected by the appellate court.

> "7. By giving out an authentic copy of a fictitious document, or by stating therein a contrary or different thing from that contained in the genuine original."

But plainly by the averments of the information the accused was not charged with giving out a copy of any docu-

ment. Mere reading of the information will verify this statement.

The trial court expressly held the accused guilty *only* under paragraphs 6 and 7. The appellate court held him guilty under paragraph 4, which provides:

> "4. By perverting the truth in the narration of facts."

Yet the trial court expressly held the accused *not* guilty of any offense under this paragraph.

Amid such confusion in legal conclusion, it is submitted this plaintiff in error could not have been sufficiently advised of the crime whereof he stood charged.

Fair analysis of the information fully confirms this conclusion. Its opening sentence is "The undersigned accuses Jose Paraiso of the crime of falsification."

By article 300 of the Penal Code, eight separate and distinct offenses are enumerated. The general charge thus made is hence manifestly insufficient. Descending to particulars, the first paragraph avers that the defendant erased certain figures from the stub, to wit, $6, and made in pencil the figures $2, "this being the amount shown on the abstract submitted to the provincial treasurer, all of this with intent to gain." But by whom was the "abstract" so submitted? Certainly the information does not in this count charge that the defendant submitted it.

The second paragraph avers no erasure or alteration, but charges that on the certificate named he entered the amount of $4, but on the stub only $2, "thereby committing the crime of falsification of a document provided for and penalized under paragraphs 4, 6, and 7 of section 300 of the Penal Code." It further appears from the "abstract submitted by him that the amount received was $2.00, thus defrauding the Government to his personal advantage and gain."

Assuming *pro argumento* the sufficiency of this count of the information, it appears by this record:

1. That the trial court upon the proof held him guilty under paragraphs 6 and 7, and the Supreme Court under paragraphs 4 and 7, although it is plain that the entire information wholly fails to charge any facts which bring the alleged offense in any possible view within the language of paragraph 7.

2. But if this count be held sufficient, then his punishment of 14 years eight months and one day of imprisonment and a fine of 5,001 pesetas has been imposed for the offense, in practical effect, of defrauding the Government out of $2.

3. Because by the third count there are neither amounts nor other data given in respect of the 38 certificates described therein, the averment being only in respect thereto,

(*A*) "upon which said certificates there *appear* to have been entered and collected by the accused larger amounts than those shown on their corresponding stubs after he had settled his accounts with the provincial treasurer," (and)

(*B*) "that the said stubs, or most of them, contain erasures, changes, and alterations, *all* of which said acts are punishable under paragraphs 4, 6, and 7 of section 300 of the Penal Code, relating to the crime of falsification for the purpose of gain."

Now, it is undeniable (1) that what amounts were thus "entered and collected by the accused" were known to the prosecution, because these thirty-eight certificates were undoubtedly in his possession or under his control, for they were described by number and name thereon and were presented on the trial.

(2) What were the amounts shown on the corresponding stubs was equally within his knowledge, for otherwise the charge could not be made; and,

(3) It is most significant that the averment "that the said stubs, or most of them, contain erasures, changes, and alterations" *wholly fails to charge* that such "erasures, changes, and alterations" were made by the accused. Manifestly, then, this third count was insufficient in statement of facts and wholly failed to charge that the accused made such "erasures, changes, and alterations," although it immediately adds: "*All of which said acts* are punishable under paragraphs 4, 6, and 7 of section 300 of the Penal Code, relating to the crime of falsification for the purpose of gain."

Now, it is respectfully submitted that inferences cannot supply the place of necessary averment in criminal pleading, nor of direct proof where an act is the subject of the charge and the gravamen of the offense. In the third count the statement in respect of the thirty-eight certificates therein named is simply that "there *appear* to have been entered and collected by the accused larger amounts than those shown on their corresponding stubs after he had settled his accounts with the provincial treasurer." But there is entire absence of *any* averment that upon the settlement of his accounts with the provincial treasurer *what* amounts so appeared thereon.

It is by inference, and inference only, that the information would seem to charge any crime against the accused by this third count. Certainly in no direct and certain language does that count charge him as a *fact* with the commission of any offense. If an indictment charged that it would "appear" that A. B. had committed murder, we submit that such form of charge would be held wholly insufficient; yet—

> "Indictments and information are tested by the same rule, in so far as the substantial description of the offense is concerned."
>
> *Ency. Pl. & Pr., vol. 10, p. 472; Title, "Indictments, Information and Complaints,"* citing numerous cases.

Again:

> "To the end that an indictment or information may serve the purposes indicated in the foregoing section, it is a general rule that it must charge all the facts and circumstances which constitute the offense, and not mere conclusions of the pleader, as no indictment can aid a charge where the facts and circumstances alleged do not bring the accused within the prohibition of the law, nor can an indictment be supported by instructions submitting to the jury issues not raised by the pleadings. But it is said that if the indictment is otherwise sufficient it is not material in what part thereof a necessary averment is made."
>
> *"Positiveness of Charge.*—It is not only necessary that the facts and circumstances which constitute the offense should be set out in the indictment, but it must be charged that the *accused did the act* which renders him amenable to the law."
>
> *Ibid.*, vol. 10, pp. 473-476.

In *United States v. Cruikshank*, 92 U. S., 542, 557, 558, 559, it was said:

> "In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Amend. VI. In *United States v. Mills*, 7 Pet., 142, this was construed to mean, that the indictment must set forth the offense 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;' and in *United States v. Cook*, 17 Wall., 174, that 'every ingredient of which the offense is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species—it must descend to particulars.' 1 Arch. Cr. Pr. and Pl., 291. 'The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable

him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances.

"'It is a crime to steal goods and chattels; but an indictment would be bad that did not specify with some degree of certainty the articles stolen. This, because the accused must be advised of the essential particulars of the charge against him and the court must be able to decide whether the property taken was such as was the subject of larceny.'" * * *

And again (p. 559):

"It must be made to appear—that is to say, appear from the indictment without going further—that the acts charged will, if proven, support a conviction for the offense alleged."

And it is equally clear that the acts must be charged as committed by the defendant in a case such as is here presented.

Differences in the amounts received and entered under the language of the third count may have arisen by mere clerical error in the statement of his accounts. The language used is peculiar. It is: "Upon which said certificates "there appear to have been entered and collected by the "accused larger amounts than those shown on their cor- "responding stubs *after* he had settled his accounts with "the provincial treasurer," etc. Clearly, this does not charge the accused with entering different amounts *before* he thus settled his accounts. The language is the exact converse. And when this is followed by the statement "and that the said stubs, or most of them, contain erasures, changes, and alterations," it is plain (1) that this language does not

charge the defendant with making such "erasures, changes, or alterations," or (2) plead that such "erasures, changes, or alterations" occurred *before* he had so settled his accounts. Indeed, the plain meaning, as expressed by the language used, is the direct contrary. Even were the language doubtful in meaning, the accused is entitled to the benefit of the doubt.

Looking, then, to the question of the sufficiency or insufficiency of the pleading *as before trial* (as we must), and we submit the third count fails to state in any admissible form the commission by the defendant of any criminal offense. Eliminating that count, and it appears by counts one and two (should they indeed be upheld) that the practical measure of his offense lay in defrauding the Government out of $6, for which he is punished by imprisonment for fourteen years eight months and one day and a fine of 5,001 pesetas. This $6 was in Philippine currency (Trial Court's Decision, R., 8), *or $3 in our American money of account.*

III.

The trial court ruled the offense as—

> "defined and punished in paragraphs 6 and 7 of article 300 of the Penal Code."
>
> "The provisions of said section are as follows:
>
> " 'The penalties of *cadena temporal* and a fine of from 1,250 to 12,500 pesetas shall be imposed on a public official who, taking advantage of his authority, shall commit a falsification, * * * (6) by making in a genuine document any alteration or interlineation altering its meaning; (7) by giving out an authentic copy of a fictitious document, or by stating therein a contrary or different thing from that contained in the genuine original' " (R., 5).

The court further held (R., 6):

> "Section 316 of the Penal Code provides:
>
> " 'If the profit which those guilty of the falsifica-

> tion punished in this section (title) may have derived, or which they proposed to gain can be estimated, there shall be imposed upon them a fine of an amount equal up to three times that of such profit, unless the maximum thereof were less than the minimum penalty prescribed for the crime, in which case the latter shall be applied.'
>
> "Three times the amount represented by the certificates falsified would be less than 1,250 pesetas, which is the minimum fine provided for similar offenses. Therefore the fine to be imposed upon the accused should not be three times the amount actually embezzled, but the fine provided for in section 300 of the Code."

And its action in respect of the punishment was affirmed by the Supreme Court (R., 9-11).

The error, therefore, is manifest. Section 316 clearly provides that where the fine "of an amount equal to three times that of such profit" is less than the minimum penalty prescribed for the crime, then and in *that* case the latter, to wit, the *minimum* penalty, shall be applied. But the trial court, although expressly finding that three times the amount represented by the certificates falsified would be less than 1,250 pesetas, which, as its decision states, "is the minimum fine provided for similar offenses," proceeded to impose a fine of 5,001 pesetas, or four times the amount of the minimum fine clearly applicable to the offense by the court's own statement of the law. The error is so manifest as not to require discussion. In such erroneous application of the law the court therefore plainly denied this plaintiff in error both due process and "the equal protection of the law."

That error is reviewable here; otherwise the plaintiff in error is without remedy.

It matters not that the errors assigned (R., 16) may be held concluded by the recent decision in *Serra & Obleno v. Mortiga* (204 U. S., 470), because the objections they cover were not raised in the trial court. The *right* to the writ of error in that case stood upon the precise ground urged in

this. The court did not dismiss the writ of error in the *Serra* case, however, but affirmed the judgment. If in that case other plain error appeared, full jurisdiction to reverse the judgment therein existed, for the court may notice a plain error not assigned. *Here* we point plain error which affects the fundamental rights of this plaintiff in error. Having jurisdiction of the entire cause, such error may, we submit, be reviewed and the judgment corrected.

IV.

While the record does not clearly indicate the exact amount which the plaintiff in error was charged to have thus appropriated, the decision of the trial court *supra* does expressly state that—

> "three times the amount represented by the certificates falsified would be less than 1,250 pesetas * * *."

Hence the amount thus charged to have been wrongfully appropriated by him certainly could not have exceeded the one-third part of 1,250 pesetas, or 416 pesetas, equal to $200, and was in fact much less; yet mark the sentence of the trial court, which has been affirmed in the Supreme Court (R., 7), to wit:

> "Wherefore, the court finds Jose Paraiso guilty of the crime of falsification of an official document, and sentences him to *fourteen years eight months and one day* of imprisonment in Bilibid, Manila, with the accessory penalties provided for in section 56, and to pay a *fine of 5,001 pesetas*, or its equivalent in Philippines currency, with costs."

The provision of the Philippines Statutory Bill of Rights (32 Stats., p. 693) is—

> "that excessive bail shall not be required nor excessive fine imposed, nor cruel and unusual punishment inflicted."

It clearly appears under Point III, *supra,* that an excessive fine has been imposed upon this plaintiff in error by the lower court's erroneous application of the section of the Philippines Code above quoted, and on which ground alone review in this court is fully justified; but it is also plain that a fine of 5,001 pesetas is certainly and at least *more than twelve times* the amount of his alleged peculation. No argument is needed to demonstrate that in simple justice this *is* an excessive fine and wholly out of proportion to the offense charged.

The case, we submit, therefore, is rightly within the jurisdiction of this court, because (1) by the plain misapplication of the Philippine Penal Code an unlawful fine has been imposed, far beyond the amount clearly prescribed thereunder for the offense charged, and (2) because the amount of fine actually imposed is in every view excessive to the last degree.

The sentence is even more obnoxious and cruel in its imposition of imprisonment for fourteen years eight months and one day for what in effect is the alleged unlawful appropriation of less than 400 pesetas, or $200, expressed in American money.

In *Trono et al v. United States* (199 U. S., 521) this court affirmed the sentence of the Supreme Court of the Islands against Trono for the exact period of time as is imposed in present case, although Trono was convicted by the Supreme Court of the Islands "of the crime of homicide (in substance, murder in the second degree)," to use the exact language of this court (p. 252).

Can it possibly be said that the crime for which this plaintiff in error was convicted, namely (and stated in practical form), the falsification of a record to his gain in the possible maximum sum of $200, justifies a sentence of imprisonment for the exact term imposed in the Trono case for "the crime of homicide (in substance, murder in the second degree)"? The statement of the proposition carries its strongest argument and, we respectfully submit, its own condemnation.

How can imprisonment for such an extended period, for such an offense, be ranked, in respect of term, with punishment for the crime of homicide or murder without violating in the plainest way the prohibition of the Philippine Bill of Rights against cruel and unusual punishment?

We respectfully submit that the language of the prohibition cannot be confined only to the *form* of punishment. In carrying our free institutions to the Philippines, how can such injustice be recognized, when upon the mainland such duration of punishment for the offense of which this plaintiff in error has been convicted could never be so ranked with punishment for the crime of homicide?

In *O'Neill v. Vermont,* 144 U. S., 323, this court declined to consider the case for want of jurisdiction, but the extreme punishment of imprisonment inflicted upon O'Neill by the courts of Vermont was made in part the basis of the strong dissenting opinions delivered by Justices Field and Harlan. Mr. Justice Harlan's opinion concludes with the statement that "Mr. Justice Brewer authorizes me to say that in the main he concurs with the views expressed in this opinion."

We respectfully ask consideration of those dissenting opinions (pp. 359-366 and 370-371) because stating in much abler language than counsel can employ the broad sweep of this question in its plain application to the case at bar.

> "But it is possible that imprisonment in the State prison for a long term of years might be so disproportionate to the offense as to constitute a cruel and unusual punishment."
>
> *McDonald v. Commonwealth,* 173 Mass., 322, 328.

> "Upon the legislature alone is conferred the power to fix the minimum and maximum of the punishment for all crimes (*People v. Smith,* 94 Mich., 644). It is true that cases might arise when the punishment imposed by an act would be so cruel and unusual that the courts would interfere and protect the rights

of the party, but in the present case the penalties fixed by the act are such as the legislature had the power to impose."

People v. Whitney, 105 Mich., 622.

"When the estate of a tainted felon can only be forfeited *during life,* is it not within the contemplation of the supreme law, an *excessive fine,* or a *cruel punishment,* to forfeit *forever* the estate of a man, merely because he is unwilling and fails to improve even if he could? The Constitution says 'that excessive bail shall not be required nor excessive fines imposed, nor cruel punishment inflicted.'"

Gaines et al. v. Buford, 31 Ky. (1 Dana), 481, 492.

In *State v. Driver* (78 N. Car., 423) imprisonment in the county jail for five years for the offense of wife-beating was held by the court as cruel and unusual punishment. We beg to commend the full decision in this case to the examination of the court, both for its review of the law and the sound sense displayed in its discussion.

The offense of falsification, for which this plaintiff in error was arraigned and tried, has its closest resemblance in those provisions of the Federal statute which relate to forgery and embezzlement, under title LXX, "Crimes," chapter 5, "Crimes against the operation of the Government," U. S. Rev. Stats. Thus, section 5417 punishes the forgery or alteration of customs certificates or entry with imprisonment for not more than three years.

And section 5418 provides that the forging or alteration of any public record shall be punishable by imprisonment "for a period of not more than ten years, or by fine of not more than $1,000, or be punished by both such fine and imprisonment."

By section 5419 forgery of the signature of a judge or the seal of any court is punished by a fine of not less than $500 and not more than $5,000 and imprisonment for not more than five years.

Section 5420, for the forgery or alteration of any military bounty land warrant, or receipt for purchase-money for any of the public lands of the United States, imposes imprisonment not less than three years nor more than ten years.

Section 5421 provides that a forgery or alteration of a power of attorney to receive any sum of money from the United States shall be punished by imprisonment "not more than five years and fine not more than $1,000."

By section 5423 the forgery or alteration of ship's papers is punished by a fine of not more than $1,000 and by imprisonment not more than three years.

By sections 5424 and 5425 the forging or alteration of naturalization papers or certificates of naturalization is punished by imprisonment "not less than one year nor more than five years, or by a fine of not less than $300 nor more than $1,000, or by both such fine and imprisonment."

And the same punishment is prescribed under section 5426 for voting under a false certificate of citizenship.

Turning to the statute which punishes the offense of embezzlement of public funds (sections 5488, 5490, 5491, 5492, and 5493), the imprisonment is, for the various offenses under that head, of from six months to a year as minimum and ten years as a maximum, with a fine "in a sum equal to the amount of money so embezzled."

And the act of February 3, 1879 (20 Stats., 280), amends section 5497, U. S. Rev. Stats., in respect of the crime of wrongful conversion of any money or property of the United States by any officer in the Internal Revenue Service "to a fine equal to the value of the money and property thus embezzled or converted, or by imprisonment not less than three months, nor more than ten years, or by both such fine and imprisonment."

It is thus plain that the measure of imprisonment necessarily bears just relation to the amount actually embezzled, and the discretion of the court to impose sentence between these extreme minimum and maximum periods has, of

course, resulted in necessary dearth of Federal decisions upon this point.

So grand larceny, in the District of Columbia, is punished by imprisonment for not less than one nor more than three years, and for the second offense not less than three nor more than ten years.

The foregoing provisions of the Federal law are given as illustrative only. Full résumé of the statute law of the several States for embezzlement, forgery, and grand larceny would be impossible here, but it may be fairly assumed that the measure of punishment inflicted by the Federal law has just application in determining whether [redacted] an offense which in its practical aspect was simply the embezzlement through alteration of tax certificates and accounts in the maximum sum of $200, American money, can be punished with imprisonment for fourteen years and eight months without violation of the Philippine Bill of Rights, against cruel and unusual punishment, when such offenses committed against the United States Government upon the mainland are visited with far less punishment, and when it is remembered that this sentence far outruns in time the *maximum* imposed for the gravest offenses in respect of forgery and embezzlement.

In the last analysis, the provisions of the Philippine Penal Code, under which this plaintiff in error was convicted, must be governed by these guarantees of the Philippine Bill of Rights, for it is certain that the extension of these fundamental guarantees by the Philippine Bill of Rights, and taken from our own National Constitution, must in their application be construed with reference to the common law from which they were taken. Such is the express ruling of this court in *Kepner v. United States* (195 U. S., 100, 121).

The penalty of "cadena temporal," imposed on this plaintiff in error, is made by article 28 of the Penal Code to extend from twelve years and one day to twenty years, and the

"accessory penalties provided for in section 56," as so imposed (R., 7), are:

> "1. Civil interdiction of the person punished during the term of the sentence.
> "2. Perpetual absolute disqualification.
> "3. Subject to the surveillance of the authorities during the life of the person punished."

The sentence, then, is nearly fifteen years' confinement; perpetual absolute disqualification; police surveillance during life and a fine of 5,001 pesetas, or over twelve times the amount appropriated.

And all for an offense which resulted in the Government's alleged maximum loss of $200 revenue!

V.

We submit, the judgment should be reversed.

Respectfully submitted,

ALDIS B. BROWNE,
ALEX. BRITTON,
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In the Supreme Court of the United States.

OCTOBER TERM, 1907.

JOSE PARAISO, PLAINTIFF IN ERROR
v.
THE UNITED STATES. } No. 23.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR THE UNITED STATES.

An information was filed on July 29, 1904, in the Court of First Instance of the Province of La Laguna, Philippine Islands, charging plaintiff in error, in his capacity as municipal treasurer of the town of Lumbang, with the crime of falsification in having issued certain poll-tax certificates to different taxpayers, and entered upon the corresponding stubs smaller amounts than those appearing on the certificates themselves and actually collected, such altered stubs forming the basis of his subsequent settlement of accounts with the provincial treasurer. (Rec., pp. 1–2.)

The Court of First Instance found defendant guilty of the offense charged, under paragraphs 6 and 7 of article 300 of the Penal Code of the Philippines,

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which define and punish the crime of falsification of official documents as follows:

> ART. 300. The penalties of *cadena temporal* and a fine of from 1,250 to 12,500 pesetas shall be imposed on a public official who, taking advantage of his authority, shall commit a falsification.
>
> * * * * *
>
> 6. By making in a genuine document any alteration or interlineation altering its meaning.
>
> 7. By giving out an authentic copy of a fictitious document, or by stating therein a contrary or different thing from that contained in the genuine original.

Defendant was sentenced to imprisonment for fourteen years, eight months, and one day, with accessory penalties provided for in section 56 (civil disabilities), and to pay a fine of 5,001 pesetas, with costs (p. 7).

On appeal to the Supreme Court of the Philippines, the judgment of the trial court was affirmed (p. 11); a motion for rehearing followed, which was denied (pp. 12–13), and the case was then brought here on writ of error.

The assignments of error (p. 16) allege that plaintiff was not advised of the nature and cause of the accusation against him, and was convicted without due process of law.

I.

This case involves an ordinary criminal offense. When Congress by section 10 of the Philippine government act of July 1, 1902 (32 Stat., 691, 695),

gave jurisdiction to the Supreme Court of the United States to review the final judgments and decrees of the Supreme Court of the Philippine Islands, it did not intend that such offenses against the local law should be reviewed by this court on the mere allegation that the Constitution of the United States or some Federal law or privilege is involved. This court was relieved by the Circuit Court of Appeals act of the burden of hearing numerous criminal appeals, and it is impossible to suppose that Congress meant to reimpose that kind of burden in respect to cases coming from the Philippines and thus give to those islands a broader right of review than is accorded any other part of the United States or its possessions. If the mere assertion of a constitutional claim is sufficient, then there will be nothing to prevent every Philippine criminal case from coming to this court.

It has been repeatedly held that the constitutional or other Federal claim must be real and substantial in order to give jurisdiction to this court; that the bare averment of a Federal question is not sufficient; there must be at least color of ground therefor. (*Millingar* v. *Hartupee*, 6 Wall., 258; *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S., 79; *Hamblin* v. *Western Land Co.*, 147 U. S., 531; *Fort Smith Ry.* v. *Merriam*, 156 U. S., 483; *Clarke* v. *McDade*, 165 U. S., 172; *Wilson* v. *North Carolina*, 169 U. S., 595; *Lampasas* v. *Bell*, 180 U. S., 276; *Sawyer* v. *Piper*, 189 U. S., 154; *American R. R. Co.* v. *Castro*, 204 U. S., 453.)

Further, the claim must be seasonable; it must be made "at the proper time in the proper way;" that is, in the trial court, or at least, in State cases, before final judgment in the highest court of the State. (*Lawler* v. *Walker*, 14 How., 149; *Spies* v. *Illinois*, 123 U. S., 131, 181; *Brooks* v. *Missouri*, 124 U. S., 394; *Morrison* v. *Watson*, 154 U. S., 115; *Winona, etc., Land Co.* v. *Minnesota*, 159 U. S., 541; *Oxley Stave Co.* v. *Butler Co.*, 166 U. S., 658; *Citizens' Savings Bank* v. *Owensboro*, 173 U. S., 643; *Home for Incurables* v. *New York*, 187 U. S., 155.) A constitutional question giving jurisdiction to this court is not presented by a record which merely shows that the question is contained in the specifications of error, made for the purposes of appeal, and was not presented to the trial court. (*Arkansas* v. *Schlierholz*, 179 U. S., 598; *Johnson* v. *N. Y. Life Ins. Co.*, 187 U. S., 491; *Chicago Ry. Co.* v. *McGuire*, 196 U. S., 128; *Hurlbert* v. *Chicago*, 202 U. S., 275; *Osborne* v. *Clark*, 204 U. S., 565; *Scora* v. *Mortiga*, 204 U. S., 470.)

In the present case the record shows that plaintiff did not raise the question until he applied for a rehearing to the Philippine Supreme Court. It has been held directly that a privilege of immunity under the Constitution can not be set up in this court when suggested for the first time in a petition for rehearing after judgment. (*Texas Pac. Ry.* v. *Southern Pacific Co.*, 137 U. S., 48; *Caldwell* v. *Texas*, 137 U. S., 692; *Loeber* v. *Schroeder*, 149 U. S., 580; *Miller* v. *Texas*, 153 U. S., 535; *Sayward* v. *Denny*, 158 U. S., 183.)

But here no real constitutional question is raised at all. The allegation that there was not due process of law is simply the general makeweight employed in such cases; and the claim that plaintiff was not advised of the nature of the accusation against him is another phrase from the Bill of Rights (sec. 5, Philippine government act of July 1, 1902; 32 Stat., 691), which has a real meaning, but does not countenance pretense. The information was clear and specific. All the proceedings were in conformity with the Philippine criminal code and the code of criminal procedure in force in the Philippines when the United States took possession, which were continued by our authorities (General Orders 58, April 23, 1900; 1 Pub. Laws, 1082) in accordance with well-known principles of international law, and were formally recognized by various enactments of the Philippine Commission, passed in pursuance of the authority given to the President by Congress. (Spooner amendment, March 2, 1901; 31 Stat., 910; sec. 1, Philippine government act.) The validity of these laws has been recognized by Congress in subsequent legislation and by the decisions of this court. (*De Lima* v. *Bidwell*, 182 U. S., 1, 196; *Dorr* v. *United States*, 195 U. S., 138, 153.) In the latter case the court said: "The right of Congress to authorize a temporary government of this character is not open to question at this day." The accused was charged with the crime of "falsification," committed as follows: The complaint stating precisely and minutely what acts he did in connection with specified

tax receipts and the stubs corresponding to them. Whether those acts violated one paragraph or another of section 300 of the penal code is a matter of law open to the accused as much as to the Government. He was told plainly what acts he was accused of doing and that they were a crime denounced by section 300. That certainly was all he was constitutionally entitled to be told.

II.

Opposing counsel asserts that objection to the sufficiency of the complaint was made before the trial court.

It is true that at page 20 of the record there appears a stipulation made between defendant's attorney and the attorney-general of the Philippines with regard to the omission of evidence from the record, in which the following sentence occurs:

> And that it further appears that the defendant objected to the reception of any evidence in support of the complaint because it was incapable of being sustained by evidence, which objection was overruled.

This informal statement of objection to the reception of testimony, counsel contends, must be taken as tantamount to a formal demurrer to the sufficiency of the complaint. It is also stated in the stipulation that defendant, before any evidence had been received, prayed the court for leave to withdraw his plea of not guilty and substitute it with the statement that he did not know how to plead, which request was denied by the court. The subsequent objection to

the reception of the evidence on the ground that the complaint was incapable of being sustained by evidence appears to refer, not to the insufficiency of the complaint, but to the innocence of the defendant and the impossibility of sustaining the charges preferred against him. With all due allowances for the differing modes of expression and practice prevailing in the Philippines, I submit that the language quoted above can not be regarded as constituting a demurrer to the insufficiency of the complaint, and that the Philippine Supreme Court committed no error in holding that no exception had been taken by the defense against the complaint. (Rec., p. 11.)

III.

Counsel is clearly in error when he contends that the sentence of the Court of First Instance, affirmed by the Philippine Supreme Court, constitutes ground for reversal by reason of the fact that the court misapplied the law governing the degree of fine to be imposed. An examination of the provisions shows no error whatever in their application. Article 316 of the Penal Code provides as follows:

> If the profit which those guilty of the falsification punished in this title may have derived, or which they proposed to gain, can be estimated, there shall be imposed upon them a fine of an amount equal up to three times that of such profit, unless the maximum thereof were less than the minimum penalty prescribed for the crime, in which case the latter shall be applied.

Counsel say that the words "the latter" refer to *the minimum penalty*, and not merely to *the penalty*, provided for in section 300; and consequently that when the court found that "three times the amount represented by the certificates falsified would be less than 1,250 pesetas, which is the minimum fine provided for similar offenses" (Rec., p. 6), defendant should have been fined that amount instead of the penalty in its medium degree imposed by the court.

While it must be admitted that the closing words of article 316, as they appear in the English translation, are not entirely free from ambiguity, resort to the Spanish original completely resolves all doubt as to their meaning. The article in Spanish reads as follows:

> Cuando sea estimable el lucro que hubieren reportado ó se hubieren propuesto los reos de falsificación penados en este título, se les impondrá una multa del tanto al triplo del lucro, á no ser que el máximo de ella sea menor que el mínimo de la señalada al delito, en cuyo caso se les aplicará ésta.

Translated literally, the last two clauses would be "unless the maximum thereof were less than *the minimum of the fine* prescribed for the crime, in which case *that* shall be applied."

It will be noticed at once that the word "*ésta*"—*that*—is used here with its feminine termination, and relates, therefore, unmistakably, not to the word "*mínimo*," the gender of which is masculine, but to the words "*la* (multa) *señalada*"—the penalty fixed

for the offense. Accordingly the court was not restricted to imposing the minimum penalty prescribed by article 300, but could impose a larger amount between the sum of 1,250 pesetas and 12,500 pesetas, in its discretion, and in imposing the fine in its medium degree, namely, 5,001 pesetas, the court acted wholly within the law.

IV.

It can not properly be contended that this fine is excessive, or that the term of imprisonment is a cruel and unusual punishment. In fixing the amount of the penalty the Philippine courts are guided by the circumstances attending the offense, whether extenuating or aggravating. For example, if there are neither aggravating nor extenuating circumstances, the medium degree of the penalty is imposed; if only an extenuating circumstance attended the deed, the minimum fine must be imposed; and if there is only an aggravating circumstance, the maximum degree must be imposed. (Art. 81, Penal Code.) Here, as the court held, "there are no circumstances, either aggravating or mitigating, to be considered," and accordingly the penalty was imposed in its medium degree.

As to the term of imprisonment, which, it is contended, is cruel and unusual, a long term of imprisonment is neither cruel nor unusual, as these words are used in the Bill of Rights. That description refers rather to mutilations and degradations, and not to length or duration of the punishment. The penalty of *cadena temporal*, which article 300 prescribes for

this class of offenses, includes a term of imprisonment ranging from twelve years and one day to twenty years. (Art. 28.) The sentence of fourteen years imposed here is therefore well within the law.

The provision of the eighth amendment to the Constitution that—

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted,

was taken from the English act of 1 W. & M., c. 2, which recited that "excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects; and excessive fines have been imposed; and illegal and cruel punishments inflicted;" and declared that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The phrase "cruel and unusual punishment" has not been defined by this court. In *Wilkerson* v. *Utah* (99 U. S., 130), Mr. Justice Clifford, in delivering the opinion of the court, referring to Blackstone, said:

> Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution.

These words were quoted by the Chief Justice of this court in the case of *In re Kemmler* (136 U. S., 436), where it was held that the punishment of death by electricity is not cruel within the meaning of the constitutional prohibition. The State courts are not entirely in accord as to the meaning of the term, but the majority of the cases hold that the words as employed in the Constitution signify such punishment as would amount to torture, or which is so cruel as to shock the conscience and reason of men; that something inhuman and barbarous is implied. (*State* v. *Williams*, 88 Mo., 310; *Miller* v. *State*, 49 N. E., 894; *Hobbs* v. *State*, 32 N. E., 1019; *In re Bayard*, 25 Hun., 546; *State* v. *Becker*, 51 N. W., 1018; *Territory* v. *Ketchum*, 65 Pac., 169; *People* v. *Morris*, 45 N. W., 591.)

If the term of imprisonment in such a case seems excessive compared with the offense, then it is for the Philippine executive authority or for Congress to change the law.

I submit that the judgment of the lower court should be affirmed.

HENRY M. HOYT,
Solicitor-General.

CHARLES W. RUSSELL,
Assistant Attorney-General.

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In the Supreme Court of the United States.

OCTOBER TERM, 1906.

JOSE PARAISO, PLAINTIFF IN ERROR, v. THE UNITED STATES.	No. 270.
JOHN M. FLEMISTER, PLAINTIFF IN ERROR, v. THE UNITED STATES.	No. 349.
A. R. STUART, PLAINTIFF IN ERROR, v. THE UNITED STATES.	No. 456.
NICOLAS ARCEO, PLAINTIFF IN ERROR, v. THE UNITED STATES.	No. 548.
FRANK DE L. CARRINGTON, PLAINTIFF in error, v. THE UNITED STATES.	No. 597, 598 & 599

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

MOTIONS TO DISMISS OR AFFIRM; OR TO ADVANCE.

Comes now the Solicitor-General, on behalf of the United States, and moves the court to dismiss or affirm the above-entitled causes, or to advance the same (Rule 26, par. 3) and set them down for oral hearing or submission on a day convenient to the court during the present term.

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It seems proper thus to combine these cases in order to emphasize the common ground of objection to bringing the ordinary criminal prosecutions of the Philippines into this court and in order to dispose of them all promptly. If the court does not see fit to dismiss or affirm, the Government will be prepared to submit the cases on the merits with little addition to the discussion herein, and that, mainly, to meet the requirement and expectation of the court that a case submitted on the merits demands a separate brief.

These are all writs of error to the supreme court of the Philippine Islands, in criminal cases, under section 10 of the act of July 1, 1902 (32 Stat., 691, 695), which provides:

> That the Supreme Court of the United States shall have jurisdiction to review, revise, reverse, modify, or affirm the final judgments and decrees of the supreme court of the Philippine Islands in all actions, cases, causes, and proceedings now pending therein or hereafter determined thereby, *in which the Constitution or any statute, treaty, title, right, or privilege of the United States is involved*, or any causes in which the value in controversy exceeds twenty-five thousand dollars, or in which the title or possession of real estate exceeding in value the sum of twenty-five thousand dollars, to be ascertained by the oath of either party or of other competent witnesses, is involved or brought in question; and such final judgments or decrees *may and can be reviewed*, revised, reversed, modified,

> or affirmed by said Supreme Court of the United States on appeal or writ of error by the party aggrieved, in the same manner, under the same regulations, and by the same procedure, as far as applicable, *as the final judgments and decrees of the Circuit Courts of the United States.*

No. 270. Paraiso v. United States.

This was an information for the crime of falsification of an official document by a municipal treasurer, under paragraphs 4, 6, and 7 of article 300 of the Penal Code of the Philippines, which punishes by fine and imprisonment (*cadena temporal*, from twelve years and one day to twenty years; article 28) a public official who commits a falsification "by making in a genuine document any alteration or interlineation," etc. (pp. 1, 2).

The defendant entered upon the stubs of poll-tax certificates smaller amounts than those actually collected and which appeared on the certificates themselves. The Court of First Instance found him guilty and sentenced him to imprisonment for 14 years 8 months and 1 day, with the "accessory penalties" prescribed in article 56 (civil disabilities), and to pay a fine of 5,001 pesetas, with costs (pp. 3–7).

The Supreme Court of the islands affirmed the judgment, holding that "the judgment of the trial court is in strict conformance with the proof presented by the prosecution, as well as the defense, and the merits of the case and the law applicable thereto.

There is no doubt that the defendant is guilty, and that, as has been demonstrated, had acquired the reprehensible habit of falsifying documents for the purpose of gain." It was also held that while the complaint contains specifications of various criminal acts, there is only one single crime of falsification charged, conforming to the Philippine law, to which the judgment and sentence also conformed (pp. 9–11). There was no dissent.

There was a motion for rehearing (p. 12), setting up that defendant was not advised of the nature and cause of the accusation against him and was convicted without due process of law, which was denied. The assignment of errors here alleges the same errors (p. 16).

No. 349. Flemister *v.* United States.

This was an assault upon a police officer as he attempted to place the defendant under arrest for violent conduct and abusive language. The charge fell under the general heading of "criminal attempts against the authorities and their agents, resistance and disobedience" (Code, Title III, c. 4). It is evident that Flemister was an old offender in the way of disorderly conduct and breach of the peace (Rec., pp. 3, 4; *United States* v. *Flemister*, 3 Official Gazette, 386).

The Court of First Instance (pp. 7–11) found him guilty of violation of article 252 of the Code, punishing gross disobedience of the authorities, and accordingly sentenced him to imprisonment for 4 months and 16 days (*arresto mayor*, article 28) and a fine of

2,000 pesetas, with costs, and the civil disabilities corresponding to that grade of punishment (art. 61); also to "subsidiary imprisonment" in case of insolvency (art. 50, par. 1; compare secs. 1041, 1042, and 5296, R. S.).

On appeal the Supreme Court placed the offense under paragraph 2, article 249, which punishes actual assault upon the authorities and grave intimidation and resistance of them, increasing the sentence to imprisonment for 2 years and 6 months, with a fine of 3,750 pesetas and costs, under paragraph 5 of article 250, and in accordance with the decision in *Trono* v. *United States* (199 U. S., 521). There was no dissent (pp. 11–16).

The assignments of error were that the Supreme Court of the islands was without jurisdiction to increase the sentence of the trial court; that to do so in effect converts the Appellate Court into one of original jurisdiction, and deprives an accused person of the right to be confronted with the witnesses against him; that defendant was deprived of his liberty without due process of law, and was placed twice in jeopardy (p. 18).

No. 456. Stuart *v.* United States.

The defendant was deputy collector of customs at Iloilo, and was charged with falsification of public documents, to wit, a general expense voucher. (Rec., pp. 1–2.) The trial court, in admitting over objection a question favorable to the defense, thus put the case: "This man in December on his account

current credited himself with having spent 500 pesos when he had not spent it." (Tr., p. 142, not included in extracts as printed for this motion.) It was not proved by the Government that the defendant converted any sums to his own use, and his explanation of his offense was that in accordance with a custom and under the authority and direction of the collector—which was denied by the latter—he secured and held the money to evade an accounting regulation under which important work would have been suspended for an interval because of lack of funds, and that he paid the money out later on public account for labor. Quoting, again, from the court during the trial (p. 253, original transcript):

> In my opinion, whether he abstracted a dollar or a thousand is not material. This is a case where the accused is charged with falsification of a public document, and whether he embezzled money from the Government or not is not material.

The trial court in its opinion lays down the proposition that one commits an unlawful act with criminal intent when he premeditatedly commits that act knowing it to be unlawful, and it makes no difference if he does the act with a good motive (cf. Am. and Eng. Encyc., vol. 8, p. 290).

The court also said (Rec., p. 7):

> The contention of the defense to the undisputed facts in this case is rather a plea of justification, and that there was a lack of criminal intent on the part of the accused in doing what he did.

Then, reviewing the evidence, the court continues:

> So far as any official document in the insular auditor's office or in the office of the collector of customs at Iloilo, or that the accused has produced, would show, there is nothing to indicate that ever one dollar of this 500 pesos was expended, although it may have been expended as the accused testifies. * * * However, this court does not consider it an essential element in a case like this, only as it might be an aggravating circumstance if proven that it had been appropriated by the accused for his private use. * * * He did deceive the insular government, as is shown by his account current—he deceived the insular auditor into the belief that he had paid out this money, and by the insular auditor was given credit for it. This is criminal intent fully proven, and within it is implied legal malice. He goes further—he extracts from the public funds for which he is accountable 500 pesos and puts it in his safe and makes no official note or mention of it whatever. Had this accused been acting in good faith, he would have permitted that money to either remain in the bank, or, if he took it out, he would have made such note of it in his records that in case of his death or anything happening to him the government would know the real facts and that this 500 pesos was government money. The moment he removed that 500 pesos from his official funds in the bank he appropriated it to his own use for the time being and made it a part

of his private funds. He says that he expended this 500 pesos in the month of January on these tanks—and it may be that he did—but there is nothing of record to show that he did. In fact, when he went away from here, so far as his records show, these tanks had only cost the government 500 pesos, and that they were paid for upon this voucher, Exhibit A—when, according to his testimony, he had not only expended the original 500 pesos estimated before the building of these tanks, but he had expended two or three times more than that amount of other government funds upon the tanks. He again deceives the government when he represents to it that these tanks only cost 500 pesos, when, as a matter of fact, from his evidence, they cost several times that amount. * * *

So, from the evidence in this case, the court must find that the accused is guilty of the charge of falsification, as alleged in the complaint, and it will be necessary to impose the penalty fixed by the Penal Code as provided in article 300. * * *

The court believes it to be true that the penalty is a very drastic one, but it is the law, and if the court finds the accused guilty it must impose the penalty, and the question of the enormity of the penalty as attached to the importance of the crime is a matter that can only be considered by the clemency power. (Rec., pp. 17, 19–20.)

The defendant was found guilty and sentenced to imprisonment for 12 years and 1 day (Rec., p. 21),

under article 300 (and art. 28). The Supreme Court affirmed the sentence, with civil disabilities and costs, finding the accused guilty "without any doubt, in the form and mode that is alleged in the complaint" (Rec., p. 23). There was no dissent.

The assignment of errors is that defendant was convicted without due process of law, without any accusation being presented against him, and upon an information that did not advise him of the nature and cause of the accusation against him (pp. 23–24).

No. 548. Arceo *v.* United States.

The charge was the abduction of a minor, the offender being a married man and the minor a girl of 16 (Art. 446 of the Code.) The defendant was found guilty and sentenced to 2 years imprisonment and a fine of 1,000 pesos (*prisión correcional*, art. 28). (Rec. p. 12.) On appeal this sentence was affirmed without dissent. (Rec. p. 22.)

The assignments of error (p. 24) set up that the decision of the Supreme Court of the Philippines violates section 5 of the act of July 1, 1902, as guaranteeing to every person the equal protection of the laws, in that the accessory imprisonment in case of insolvency under article 50 is "to establish a distinction in the application of the law to the poor and the rich;" and because the judgment violates the guarantee of section 5 of that act "that no person shall be imprisoned for debt."

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No. 597. Carrington *v.* United States.

This was also an information for the crime of falsification of a public document, by a disbursing officer of the Philippine government, who was also an officer in the United States Army. Defendant made a false voucher, purporting to show a certain expenditure from funds appropriated for purposes of the Louisiana Purchase Exposition (pp. 1–3), to the amount of $385.

The Court of First Instance found him guilty and sentenced him to imprisonment for 12 years and 1 day, with costs (p. 11). On appeal to the supreme court of the islands the judgment was affirmed and the sentence of the Court of First Instance modified (under paragraph 1, article 81 of the Code; see also article 96) to imprisonment for 14 years, 8 months, and 1 day of "*cadena temporal*" and to a fine of 1,250 pesos, with costs; the court saying: "There having been no attenuating or aggravating circumstance in the commission of the crime, it is proper to impose upon the accused the medium degree of the punishment" (p. 20). There was no dissent.

A motion for rehearing was made upon the grounds (1) that defendant, being an officer of the United States Army, could not hold a civil office under the Philippine government, under section 1860, R. S.; (2) that being such army officer he could not be tried on a criminal charge in a civil court except by a jury; (3) that the punishment was cruel and unusual (pp. 21–22). The motion was denied. The same errors are alleged in the assignment of errors here (pp. 23–24).

Carrington was indicted in five cases in all (p. 9, V). Three of these cases went to the Supreme Court of the Philippines, being consolidated for trial, and have come here, the particular case now before the court to be decisive of the issue in all (Stipulation, p. 29). The total sentence of imprisonment imposed amounted to forty years (Orig. Tr., No. 599, p. 14). It may be added that Carrington was court-martialed for these offenses and was dismissed from the service of the United States, ceasing to be an officer of the Army from July 15, 1905 (G. O., No. 121 of the War Department, dated July 26, 1905).

There is still another case which can not be embraced in these motions, because it has just come in and has not yet been docketed by the plaintiff in error, no appearance has been entered, and the Government is not at liberty, therefore, to print extracts from the record. It will be in order, however, before the close of this term, if the case is not then docketed, to move to docket and dismiss, and steps will be taken to that end. In the meantime it is appropriate to state the nature of that case now, because it is another striking illustration of the trivial nature of all these writs of error.

The defendants, *Marcelo Leaño* and *Maria Gonzalez*, husband and wife, were charged with the crime of *estafa* (swindling, art. 535 of Code, par. 5), in securing from a jeweler a ring, worth about $375, and converting it to their own use by pawning it. After

the commission of the crime, while the owner was endeavoring to recover the ring, the defendants executed a document acknowledging that they were indebted to the complainant for the value of the ring, to be payable in installments.

The Court of First Instance found the defendants guilty, the woman as principal and the husband as accessory, sentenced the former to 5 months of imprisonment, and the husband to pay a fine of 1,000 pesetas, etc. (Art. 534, par. 2; art. 96.)

The Supreme Court held that the document was accepted as evidence that the defendants had received and retained the ring, but that it did not constitute a novation of the original commission obtained in bad faith and with fraudulent intent; that this acknowledgment of the debt did not affect the nature or essence of the crime of *estafa*.

> An agreement or compromise between the aggrieved party and offender to guarantee the civil liability of the latter does not affect the criminal liability to the extent of blotting out or destroying the existence of the crime, which should be punished by the courts of justice even though the offended party has been indemnified in full. Such is the settled doctrine of our jurisprudence.

The conviction was affirmed, but the husband was found to have participated in the crime as principal, and both defendants were sentenced to 5 months' imprisonment with civil disabilities, each to pay one-half the costs. There was no dissent.

The assignment of errors claims, as usual, that there was not due process of law; that the evidence was not sufficient to convict, and that it was an error to punish the man as principal and not as accomplice, in accordance with the decision in first instance.

THE MOTIONS TO DISMISS.

These are ordinary criminal offenses, "official misconduct"—that is, forgery in a lower degree with or without embezzlement, assault and battery, "abduction" or seduction, and larceny. It was never intended by the grant of jurisdiction in section 5 of the Philippine government act that such offenses against local law should be reviewed by this court on the mere allegation that the Constitution of the United States or some Federal law or privilege is involved. The circuit court of appeals act relieved this court of the burden of hearing numerous criminal appeals, and Congress did not mean to reimpose that kind of burden and give to the Philippine Islands a broader right of review than any other part of the country or its possessions.

It is not sufficient simply to invoke the Constitution or to refer to a statute, as the act of 1902 is cited here. If merely to assert a constitutional claim or a statutory right is enough, then all Philippine criminal cases will tend to come here, and the jurisdiction of this court will be invoked simply for the purpose of delay.

In both Federal and State cases coming to this court it has been held over and over again that the constitutional or other Federal claim must be real

and substantial. There must be "fair color," otherwise dismissal follows, and the claim must be set up on the hearing in the trial court and not later, as on a petition for rehearing or assignment of errors; that is, the claim must be made "at the proper time in the proper way." Indeed, the pleadings should raise the constitutional question. A general statement that the decision is against constitutional right, or that there was not due process of law, is not enough, particularly when such objections appear only in the specifications of error. (*Lawler* v. *Walker*, 14 How., 149, 155; *Spies* v. *Illinois*, 123 U. S., 131, 181; *Brooks* v. *Missouri*, 124 U. S., 394; *Fort Smith, etc., Ry.* v. *Merriam*, 156 U. S., 478, 483; *Clarke* v. *McDade*, 165 U. S., 168, 172; *Wilson* v. *North Carolina*, 169 U. S., 586, and cas. cit.) The same principles are applied both to writs of error and appeals coming from the Circuit Court under section 5 of the Circuit Court of Appeals act. (*Arkansas* v. *Schlierholz*, 179 U. S., 598, 601; *Lampasas* v. *Bell*, 180 U. S., 276, 282, 284.)

An examination of these records will result in condemnation of the cases on the foregoing grounds. The claim that there was not due process of law is simply the general makeweight. The claim that the defendant was not advised of the nature of the accusation against him is another phrase from the bill of rights (sec. 5, Philippine government act), which has a real meaning, but does not countenance pretense. The informations could not more sedulously and specifically inform the accused of the charges against them. The Philippine civil and criminal codes and

the code of procedure were adopted by our authorities upon occupation, and thus rest on a well-known principle of international law. They were formally enacted by the Philippine legislative authority, and are fully recognized by the legislation of Congress and by the decisions of this court. They constitute a complete body of law and provide due process of law. That is the reply to Paraiso's and Stuart's claims.

In Flemister's case the notion of double jeopardy, repudiated in *Trono* v. *United States* (199 U. S., 521), is again advanced, and the further untenable contention made that a conviction or acquittal on a separate municipal charge in the police court, growing out of the same facts, bars prosecution for a distinct penal offense againts the general sovereignty.

In Arceo's case it is suggested that there is imprisonment for debt and violation of the guarantee of equal protection of the laws because, in the Philippine law (as in our own), there is a provision that if a fine is not paid a moderate additional imprisonment shall be undergone in lieu thereof.

Carrington's propositions are: (1) That being an officer of the Army in the Philippines under orders in pursuance of his duty, he was entitled to trial by jury. The *Dorr* case (195 U. S., 138) intimates no such distinction or any exception from the rule that one who violates law is to be tried by the law of the place, which is *a fortiori* when an officer of the United States violates a law of one of the possessions of the United States (and see *In re Ross*, 140 U. S., 453).

(2) That, being an officer of the Army, he could not hold a civil office in the Philippines because of section 1860, paragraph 4, R. S., act of March 3, 1883, 22 Stat., 567; and section 1222, R. S.; and that in fact he did not hold any civil office. But those statutes refer to organized Territories and to civil offices obviously incompatible under our principles of government. The performance of civil functions, including the faithful disbursement of funds in the circumstances shown, was not incompatible with Carrington's military character and office, especially considering the origin and nature of the Philippine government as necessarily carrying on civil administration through military agents. And the formal action of the Philippine Commission and governor, by which Carrington was designated to disburse the funds in question, and his holding himself out as disbursing officer, would seem to settle his status in fact.

(3) That his punishment is cruel and unusual. He violated the law with his eyes open and knew the penalties attached. A long term of imprisonment, even for an offense of moderate enormity, is neither cruel nor unusual. That description looks back to mutilations and degradations. If the punishment in this or any other of these cases seems excessive in relation to the offense, it is to be said that it is in strict accordance with the detailed scheme and schedules of Spanish law, and that the lower courts had no choice, so to speak. If the law ought to be changed or clemency should be inter-

posed, that is for the legislature or the Executive to determine.

In a case coming here under section 709 (*Spies* v. *Illinois*, 123 U. S., 131, 164) it is said:

> In our opinion the writ ought not to be allowed by the court, if it appears from the face of the record that the decision of the Federal question which is complained of was so plainly right as not to require argument, and especially if it is in accordance with our well-considered judgments in similar cases. That is in effect what was done in *Twitchell* v. *Commonwealth* (7 Wall., 321), where the writ was refused because the questions presented by the record were "no longer subjects of discussion here," although if they had been, in the opinion of the court, "open" it would have been allowed. When under section 5 of our rule 6 a motion to affirm is united with a motion to dismiss for want of jurisdiction, the practice has been to grant the motion to affirm when "the question on which our jurisdiction depends was so manifestly decided right that the case ought not to be held for further argument" [citing *Arrowsmith* v. *Harmoning*, 118 U. S., 194, 195; *Church* v. *Kelsey*, 121 U. S., 282].

That was a petition for a writ of error which was dismissed (and see *Craemer* v. *State of Washington*, 164 U. S., 704), and the discretion of the court to allow or not was emphasized. I see no reason why

the same principle should not guide here. There is room for the discretion of the court, and it can be exercised in this way. A writ of error always seems to call for a special allocatur in accordance with the established practice and following the common law as distinguished from the rule in equity, where an appeal is of right.

Opinions recently delivered (February 25, 1907) illustrate the subject anew and indicate when the Federal question must be raised and when an appeal is frivolous. (*Osborne et al.* v. *Clark et al.*, dismissed; *Serra et al.* v. *Martiga*, judgment affirmed; *American R. R. Co. of Porto Rico* v. *Castro et al.*, two cases, dismissed.) In *Osborne* v. *Clark* it is said that a defendant can not try his chances by suggesting here for the first time that the decision is wrong under the Constitution of the United States. *Serra* v. *Martiga*, in which the appeal was affirmed, is particularly significant, because it is a criminal case coming from the Philippine Islands very similar to those now before the court. The principle that the constitutional claim must be raised promptly is so imperative that it sustains a complaint under the Philippine code which otherwise would be fatally defective. That decision is conclusive, also, as to Flemister's objection that the peculiar right of review by the Supreme Court of the Philippines converts the Appellate Court into one of original jurisdiction and deprives the accused person of the right to be confronted with the witnesses against him. (Citing *Kepner* v. *United States*, 195 U. S., 100.)

The Supreme Court of the Philippines reviewing the facts as well as the law does not try *de novo* but on the record below.

Examining these records more particularly now as to the time when the constitutional question was in fact first raised, it appears that in none of the cases, except the Carrington case, was any constitutional question raised until after decision in the Supreme Court of the Philippines, and as to that case I submit that Carrington's claims are altogether without merit, and the conviction should be affirmed.

I submit that when the court looks into these records it will be disclosed that the grounds of complaint are technical and pretentious, and that the appeals are frivolous and fictitious and manifestly taken for delay, and should be dismissed. The distance of the Philippines and the time required for transmission of process to and fro involves unusual delay necessarily, and presents a tempting opportunity for protracting proceedings unwarrantably, which should be opposed and stopped.

THE MOTIONS TO AFFIRM.

The two motions are intertwined and the line between them is often hard to define. In many cases the court will not undertake to separate them, and "in such cases the question of jurisdiction will not be considered apart from the question upon the merits, or except upon hearing in regular order" (*Millingar* v. *Hartupee*, 6 Wall., 258, 262). If color for the motion to dismiss is shown, the court often goes on and

affirms (*Whitney* v. *Cook*, 99 U. S., 607; *Hinckley* v. *Morton*, 103 U. S., 764; *Micas* v. *Williams*, 104 U. S., 556; *Swope* v. *Leffingwell*, 105 U. S., 3; *The Alaska*, 130 U. S., 201; *Chanute City* v. *Trader*, 132 U. S., 210). And even where the motion to dismiss is denied, as being without color, the court will consider and sustain a motion to affirm where the assignments of error are obviously frivolous, or where it is evident that the writ of error has been prosecuted for mere delay (*Equitable Life Assurance Society* v. *Brown*, 187 U. S., 308, citing *Richardson* v. *Louisville & N. R. R. Co.*, 169 U. S., 128; *Blythe* v. *Hinckley*, 180 U. S., 333).

In the case of *Chanute City* v. *Trader*, 132 U. S., 210, the court said, by Mr. Justice Blatchford, after reviewing the cases in which this question had arisen:

> In the present case there does not appear to be any ground for contending that this court has no jurisdiction; yet we are entirely satisfied that the reasons assigned for taking the writ of error are frivolous, and that it was taken for delay only.

And again—

> But, without putting a different interpretation on subdivision 5 of rule 6 from that which has heretofore prevailed, we are of opinion that the judgment in the present case must be affirmed.

It only seems necessary, therefore, to the granting of the motions to affirm to satisfy the court that there is no merit in the appeals and that the same were taken for the purpose of delay only.

On this aspect of the situation I think only two or three points need to be further developed and fortified.

As to Flemister and his plea of *autrefois acquit*, the prosecution under the Code was for a "criminal attempt" against a certain policeman. The complaint in one case in the municipal court charged disorderly conduct in striking another person on the same occasion, and the other complaint in the police court charged him with using threatening and abusive language to a higher official of the police. Both courts below held that these offenses were separate and distinct; that though the defendant had been proceeded against in the Municipal Court for offenses resulting from the same acts with which he was charged in the Court of First Instance, yet he would not be entitled to acquittal on that plea because the acts charged in the Municipal Court constituted violation of a municipal ordinance, and the acts charged in the Court of First Instance constituted an offense under the penal code, which was distinct.

The proposition is that where the same acts constitute an offense against each of two sovereignties exercising jurisdiction over the same territory, a prosecution brought by one does not necessarily bar prosecution brought by the other. (*United States* v. *Chan Cun Chay*, 4 Official Gazette, 42.) But it is suggested that it is not necessary to invoke that doctrine because the offenses charged in the municipal court do not in fact include the offenses for which Flemister was tried in the Court of First Instance;

and, examining the ordinance (sec. 1, No. 28, Report Philippine Commission, 1902, Pt. 2, p. 1213) in comparison with articles 249 and 250 of the Code, it appears that the two laws punish different offenses. The principle controlling this matter is well stated in a North Carolina case (*State* v. *Taylor*, 133 N. C., 755, 759, 760), which applies closely to the facts here:

> This brings us to the question whether the two prosecutions were for the same offense. Ruffin, J. (in *State* v. *Nash*, 86 N. C., 651, 41 Am. Rep., 472), thus states the law: "To support a plea of former acquittal, it is not sufficient that the two prosecutions should grow out of the same transaction, but they must be for the same offense, the same both in law and in fact." "A single act may be an offense against two statutes, and if each requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." (*State* v. *Stevens*, supra; *State* v. *Robinson*, 116 N. C., 1046.) Disorderly conduct, of which it is the duty and province of municipal authorities to take cognizance, may not, and often does not, involve an assault. When it does so the ordinance is directed against the *disorderly conduct* and the law of the State is directed against the breach of the peace. Bleckley, C. J. (in *McRea* v. *The Mayor*, 59 Ga., 168; 27 Am. Rep., 390) says: "Many transactions which are made penal by the general law of the State may at the same time afford material for a proper police ordinance.

> The State may deal only with the central element of the transaction, which is fringed all around with adjuncts that ought to be prohibited by ordinances as highly mischievous to the quiet of municipal society. In the country such adjuncts might not need repression, for there they might be comparatively harmless. In a city we think a man may fight in a way to violate an ordinance without being guilty of an assault and battery."

The principle is well settled. (*United States* v. *Barnhart*, 22 Fed. Rep., 285; *Abbott* v. *State*, 75 N. Y., 602; *Campbell* v. *People*, 109 Ill., 565; *Moore* v. *People*, 14 How., 17; *United States* v. *Cruikshank*, 92 U. S., 542; *Fox* v. *Ohio*, 5 How., 410; *United States* v. *Marigold*, 9 How., 560.) "Conspiracy to defraud" and "causing false and fraudulent claims to be made" are held to be "separate and distinct offenses, one requiring certain evidence which the other did not. The fact that both charges related to and grew out of one transaction made no difference." (*Carter* v. *McClaughry*, 183 U. S., 365, 394.) "The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes." (*Morey* v. *Commonwealth*, 108 Mass., 433, per Gray, J.)

As to Arceo, the law of the United States is that a defendant may be imprisoned until the fine or penalty imposed is paid. (Sec. 1041, R. S.) That is more onerous than the Spanish law, which is (article 50, Penal Code) that if the defendant can not satisfy the

"pecuniary liabilities"—indemnity for the injury caused, costs of the private accuser, and the fine—he shall be subject to a subsidiary personal liability in the case of imprisonment in a penal institution at the rate of one day for every 12½ pesetas, but not to exceed one-third of the sentence imposed, and in no case to exceed one year. In the United States (secs. 1042, 5296, R. S.) indigent convicts may be discharged on oath after serving thirty days in lieu of the fine. The Spanish law does not contain that mitigation; but the provisions shown are reasonable and proper, and constitute no ground whatever for the claim that there is imprisonment for debt and that the laws do not equally protect the rich and the poor.

As to Carrington: On the claim of jury trial the Supreme Court of the islands illustrates the matter forcibly when it asks the question:

> Let us suppose, therefore, that the accused was sent by order of the President of the United States to a certain State, in which there was no provision as to trial by jury, and that while there he broke the laws of that State: Could he insist in the courts of that State, where there was no provision made for jury trials, that he be tried by jury according to the Constitution of the United States, which does not rule nor has any application in said State? In our opinion when a citizen, whether a member of the United States Army or no, goes to a certain State or Territory of the Union and breaks the laws thereof, he is subject to be

> judged in accordance with the rules established in said State or Territory, so long as the system of procedure in force in said Territory or State be of a just and impartial character.

Even if Carrington did not hold a civil "office," regarding the definition of this court in the Hartwell case as a public station or employment conferred by the appointment of government, the term embracing "the ideas of tenure, duration, emolument, and duties" (*United States* v. *Hartwell*, 6 Wall., 393), the accused certainly acted as a public official in committing the acts charged against him under the language of Article 300 of the Penal Code. As to section 1860, the original enactment of 1867 (14 Stat., 379), together with the amendment of 1883 (*supra*), should be construed in connection with existing territorial organizations at the time these laws were approved, for no other territory was then in the possession of the United States and no acquisitions of territory were in contemplation.

It was well known to Congress that should territory be acquired as a result of conquest many civil offices would be held by officers of the Army during the period of military occupation, acting under appointment of the commanding general of the occupying forces, and that this state of affairs would continue and the duties of many such offices would continue to be performed by military offices until the status of the acquired territory and its inhabitants had been determined by Congress. Had Congress intended to make this prohibition operative

beyond or outside of Territories politically organized or to be organized, language to make that prohibition clear and effective would have been used. But the statutes contain no language which expressly or by necessary implication can be regarded as applying to territory of the United States as distinguished from the organized Territories which were in existence when these statutes became law. And as section 1860 forms part of a title containing "Provisions applicable to all the Territories," if that section applies to the Philippines, each of the fifty-six sections composing that title would be equally applicable, including the legislative, executive, and judicial powers and agencies which are there provided for—a wholly untenable proposition.

As to the case of Leaño and wife, it is just above the line of petit larceny, and there is nothing in the assignments of error which has not already been considered herein. Lack of due process of law is again suggested, and the objection disposed of in the Trono case as to modifying the judgment in first instance and increasing the penalty. Such so-called constitutional questions were not raised in any way below, and appear for the first time in the assignment of errors in this court.

As to the facts in the various cases—since the Philippine courts deal freely with the facts—the Court of First Instance combining the functions of judge and jury, the opinions state, analyze, and weigh the facts exhaustively. I think this court will conclude that the facts were rightly decided, and besides, upon

writ of error the court will not review the facts or pass upon the weight and sufficiency of the evidence. (*Lancaster* v. *Collins*, 115 U. S., 222; *Crumpton* v. *United States*, 138 U. S., 361; *New York, &c., R. R. Co.* v. *Estill*, 147 U. S., 591, 617; *Humes* v. *United States*, 170 U. S., 212.)

In *De La Rama* v. *De La Rama*, 201 U. S., 303, 309, it was held that an appeal from the Supreme Court of the Philippine Islands extends to an examination of the facts as well as the law, following the usual rule as to appeals, unless there is a finding of facts under authority to make it, and in that case there was no finding of facts "either by the Court of First Instance or by the Supreme Court of the islands, except as they appear in the opinion," the court considering that it is doubtful whether this is a finding of facts within the statutes, citing authorities. But even so, the court say that they would generally accept the concurrent conclusions of the trial and appellate court, and that decision would not seem to affect the contrary rule regarding writs of error.

As to the Paraiso case, No. 270, the record is printed and the case may of course be reached for argument. The record is printed in the Carrington case. As to the Arceo case, an appearance *in propria persona* was permitted by the grace of the court and there is no counsel in this country who can be promptly served with notice of these motions. For this reason the court, if favorable to the Government on the motions, may except the Arceo case from any action taken at this time, although even in that case

due notice by mail can be given (notice by cable having already been given), and the defendant will have an opportunity to respond to the motions before the court adjourns for the term. I have presented that case, however, along with the others to illustrate the general situation and to apprise the court especially of its real nature and peculiar lack of merit.

THE MOTIONS TO ADVANCE.

If our arguments are well founded it is evident that one motive of the motions is, and one result will be, to aid the court in the disposal of business and stop the stream of unavailing appeals from the Philippines, which will continue if parties can safely speculate on cases dragging on for two years or more after final disposition in the Supreme Court of the islands. If, then, the court is not convinced that dismissal or affirmance is appropriate, the cases can be determined promptly by advancement and hearing on the merits. I do not wish wholly to commit the Government as to every case, but, so far as I can anticipate, I see no reason why the Government should not submit all these cases on briefs at any date during April which the court may fix, and with little addition to the arguments now advanced.

As I have said above, the Government is not at liberty now to move to dismiss or affirm in the Leaño case, but will be prepared to move to docket and dismiss before the close of the term, or, if an appearance should be entered and the case should be

docketed on behalf of the plaintiff in error before that time, to move to advance for hearing at an early date next term.

I submit that the motions to dismiss or affirm should be granted, or, failing that, that the motions to advance should be granted and the cases assigned for hearing at an early date.

HENRY M. HOYT,
Solicitor-General.

O

(20,314.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 70.

JOHN M. FLEMISTER, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

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1 Supreme Court of the United States, —— Term, 190-.

JOHN M. FLEMISTER, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error.

In Error to the Supreme Court of the Philippine Islands.

Proceedings had in the Court of First Instance of the City of Manila and the Supreme Court of the Philippine Islands.

THE UNITED STATES
vs.
JOHN M. FLEMISTER.

Be it remembered that heretofore, to wit, on the fifth day of October, 1904, in the Court of First Instance of the City of Manila, came José de Crame, and filed in the Clerk's office of said Court a complaint signed and sworn to by him, against John M. Flemister, which said complaint is in the words and figures following, to wit:

UNITED STATES OF AMERICA, *Philippine Islands:*

In the Court of First Instance for the City of Manila.

THE UNITED STATES, Plaintiff,
vs.
JOHN M. FLEMISTER, Defendant.

Complaint: Criminal Attempt against the Agents of the Authorities.

2 The undersigned accuses John M. Flemister of the crime of a criminal attempt against the agents of the authorities committed as follows:

That on or about the 2nd day of October, 1904, in the City of Manila, Philippine Islands, the said John M. Flemister did, then and there, wilfully, unlawfully and feloniously, attack an agent of the public authorities, to wit, Feliciano Celimin, a duly appointed, qualified and acting police officer of the City of Manila, and did, then and there, employ force against, gravely intimidate, and offer grave resistance to the said Feliciano Celimin while he was discharging the functions of his office and on the occasion thereof, and did, then and there, lay hands upon the said Feliciano Celimin while he was discharging the duties of his office, in this, that on said 2nd day of October, 1904, the said Feliciano Celimin, among other police officers of the City of Manila, was detailed and designated by the authorities to preserve the peace at the San Lazaro Race Track of the City of Manila, and that, then and there, the said John M. Flemister did commit, in the presence and view of the said Celimin

an assault and breach of the peace, and that the said Celimin, then and there, attempted to place the said Flemister under arrest for such offense; and that the said Flemister thereupon resisted such arrest and attacked and struck the said Feliciano Celimin and used vile, insulting, profane and obscene language to the said Feliciano Celimin; by reason of which attack, force, intimidation and resistance toward the said Feliciano Celimin, the authorities of the City of Manila were compelled to yield to the exaction of the said Flemister and refrain from the arrest of said Flemister; that the said offense was accompanied by the following aggravating
3 circumstance:

That the said John M. Flemister has been previously punished for two or more crimes for which the law fixes a lighter penalty than that prescribed by law for the offense charged herein.

(Signed) JOSÉ DE CRAME.

Subscribed and sworn to before me and in my presence in the City of Manila, Philippine Islands, this 5th day of October, 1904, by the said José Crame.

(Signed) MANUEL ARAULLO,
Court of First Instance, City of Manila, P. I.

Witnesses.	Addresses.
Capt. Jose Crame	Tondo Sta.
Patrolman Feliciano Celimin	"
" Francisco Cruz	"
Corporal Antonio Acuna	"
Domingo Salvador	c/o "
Faustino Villanueva y Vergara	San Lazaro Race Track.
James B. Cooley	S. S. B.
Lieut. H. C. Leerson, P. C	Sta. Lucia Barracks.
H. C. Metcalf	Act'g Clk., Municipal Court,

To bring with him record of Municipal Court showing convictions of John M. Flemister during the preceding two years.

J. McMicking Clerk, Court of First Instance,

To bring with him records of convictions of John M. Flemister during the preceding two years.

Bail recommended four thousand (4000) pesos.
HDG/CCM—10-5-04.

That after the presentation of said complaint, and on the said fifth day of October, 1904, said defendant was arrested and was thereupon released upon bond.

That thereafter and on the seventh day of October, 1904,
4 said defendant was arraigned on the charge of having made a criminal assault upon the agents of the authorities.

That thereafter, and on the 20th day of October, 1904, the said defendant entered the pleas of not guilty and of former jeopardy,

which were further set up in a plea filed the 24th day of October, 1904, in the words and figures following, to wit:

THE UNITED STATES OF AMERICA, *Philippine Islands:*

In the Court of First Instance of the City of Manila.

THE UNITED STATES, Complainant,
vs.
JOHN M. FLEMISTER, Defendant.

Criminal Assault upon the Agents of the Authority.

A note of the statements made with respect to the complaint upon arraignment in the above-entitled cause.

The accused, on being cited to appear, protested against the reading of the complaint in the above-entitled cause and stated that he was not guilty of the accusations therein contained. The accused furthermore also set up the allegations that he had already been prosecuted and acquitted for the infraction of the ordinances of the City of Manila, on a complaint duly filed in the Municipal Court of the City of Manila, and based upon the same facts and evidence, and stated to have been committed at the same time referred to in the allegations in the present complaint.

(Signed) JOHN M. FLEMISTER,
By H. D. TERRELL,
His Attorney.

5 Filed this 24th day of October, 1904.

C. A. SOBRAL,
Assistant Clerk, Court of First Instances, Manila, P. I.

That thereafter, and on the 3rd day of December, 1904, said cause came on for hearing before the Honorable Manuel Araullo, presiding over Part I of the said Court of First Instance of the City of Manila, the United States being represented by Herbert D. Gale, Assistant Prosecuting Attorney of the City of Manila, and the said defendant being represented by Mr. Howard D. Terrell, and thereupon and thereafter the following evidence was submitted to the Court in the said cause:—

THE UNITED STATES OF AMERICA, *Philippine Islands:*

In the Court of First Instance of the City of Manila, Part 1.

Criminal, No. 1826.

THE UNITED STATES
vs.
JOHN M. FLEMISTER.

Assault upon Agents of the Authorities.

DECEMBER 3, 1904.

Present Assistant Prosecuting Attorney Gale, representing
6 the United States, and the accused accompanied by his attorney Mr. Terrell.

WITNESSES FOR THE PROSECUTION.

Testimony of Germman C. Leerson.

Swears in legal form and says his name is Germman C. Leerson, is a resident of Iloilo, and is a Medical Inspector of Constabulary.

Questions by the PROSECUTION:

Q. Do you know the San Lazaro Race Track?
A. Yes, sir.
Q. Are you a member of the Manila Jockey Club?
A. Yes, sir.
Q. State whether you were at the race track October second of this year?
A. Yes, sir.
Q. What was going on there at that time?
A. There were races.
Q. What are the regulations there with respect to the occupation of the space?
A. There is a judges' enclosure; at the right is a space for the public in general; at the left a place for members of the club, attended by officials of the track.
Q. In what part of the judges' enclosure were you seated October 2nd?
A. At the left of the place where members of the club sit.
Q. Are you acquainted with the accused John M. Flemister?
7 A. Yes, sir.
Q. How long have you known him?
A. I cannot say; not long.
Q. Do you know whether he is a member of the Manila Jockey Club?

Mr. TERRELL: I object to that question. It is irrelevant and it does not matter whether or not the accured is a member of the Jockey Club.

The COURT: The objection is overruled.
Mr. TERRELL: Exception.

A. I think not.
Q. Did you see the accused Flemister in the enclosure referred to October 2nd?
A. Yes, sir.
Q. State whether your attention was called to him on that occasion?
A. Yes, sir.
Q. It was with respect to what that your attention was called to him, and state what you saw?
A. In the first place indecorous and insulting language when he pushed Corporal Acuña aside; that was all I saw.
Q. Where was the accused Flemister at that time?
A. In the enclosure where members sit.
Q. At what distance from you was he seated?
A. He was some three seats behind, and toward the left.
8 Q. What were the insulting and indecorous words you heard him use?
A. He said: "God damned son of a bitch googoo."
Q. At whom were these words directed? To whom was he talking?
A. I don't know to whom were addressed the words I heard.
Q. What policeman was there?
A. Acuña; I also saw other policemen whom I do not see now. I believe there were two others, and among them Captain Crame. Mr. Cooley was also there.
Q. What other words did you hear used there?
A. Those words "Son of a bitch googoo," he could not arrest him.
Q. Tell all the circumstances which occurred during the discussion, and the assault made against the persons mentioned?
A. I saw the corporal approach him and on coming within a distance which I cannot fix precisely, Mr. Flemister put out his hands to push him, and did push him.
Q. Was Captain Crame present when these words were used, or did he come afterwards?
A. When I first saw him Mr. Cooley had already arrived, and spoke with Mr. Flemister.
Q. And afterwards what occurred between Captain Crame, Mr. Cooley and the accused?
A. I cannot say because Captain Crame and Mr. Cooley were talking in a low voice, and I could not hear them.
Q. Did you hear what the accused said after Captain Crame
9 and Mr. Cooley arrived?
A. Mr. Flemister spoke to Mr. Cooley but I did not hear what he said.
Q. State whether the policeman Celemin was one of the persons present?
A. Yes, sir.

PROSECUTION: Nothing further.
(No cross-examination.)

Testimony of Mr. Henry E. Metcalf.

Swears in legal form and says his name is Henry E. Metcalf; that he is a resident of Manila and is Clerk of the Municipal Court.

Questions by the PROSECUTION:

Q. How long have you been Clerk of the Municipal Court?

A. Since September 15th.

Q. State whether, as Clerk of the Municipal Court, you have charge of the records of cases decided in your Court?

A. Yes, sir.

Q. State whether you have received a summons to produce in this Court the records of your Court in cases against John Flemister?

A. I have brought all I have been able to find. I do not know whether they are all there are against him.

Q. Are these the ones (exhibiting some records to the witness)?

A. Yes. They are two in which he was convicted and one
10 in which he was acquitted.

Q. Will you state in which he was convicted?

A. The hearings in all these cases were had at the same time, and one of the cases was dismissed.

Mr. TERRELL: I object to this evidence on the ground that it has no connection with the complaint, nor with the case here prosecuted.

PROSECUTION: This evidence is introduced to show the aggravating circumstance mentioned in the complaint.

The COURT: These documents are presented to prove a particular point mentioned in the complaint, and they are accordingly admitted.

Mr. TERRELL: Exception.

(The documents in questions are marked with the letters "A," "B" and "C.")

PROSECUTION: I offer in evidence case number 1698 of the Municipal Court of the City of Manila against John M. Flemister for infraction of ordinances. In this case the accused was, on June 7th, 1904, found guilty and sentenced to pay a fine of ten dollars gold. ($10.00 U. S. C.)

I also introduce case number 13637 The United States *vs.* John
M. Flemister, charge in the same court with assault. In this
11 case the accused was found guilty and sentenced to pay a fine of three dollars gold.

By Mr. TERRELL:

Q. Are these the records, here presented in evidence, which you found with respect to the cases against Flemister?

A. Yes, sir; I found five in all.

Q. I hand you this document and ask you if you, as Clerk, recognize it as a Municipal Court record?

A. Yes, sir.

Mr. TERRELL: I offer this document in evidence.

The COURT: The document is admitted.

Mr. TERRELL: In offering these documents, I would like to have the complaints copied and the copies attached to the record in this case.

The COURT: Copy the complaints and attach the copies to the record.

By the PROSECUTION:

Q. What is the fifth complaint?

A. The fifth complaint is for resisting arrest. The trial took place October 21st, 1903. This case was dismissed.

Testimony of Feliciano Celemin.

12 Sworn in legal form and says that his name is Feliciano Celemin; that he is a resident of Tondo, and is a policeman.

By the PROSECUTION:

Q. How long have you been a policeman of the City of Manila?

A. Eight months.

Q. What beat are you on now?

Mr. TERRELL: I object to that question as being immaterial and irrelevant.

The COURT: The objection is overruled.

Mr. TERRELL: Exception.

A. In the Third Precinct.

Q. In what district?

A. Santa Cruz.

Q. How long have you been on duty in Santa Cruz?

A. Three days.

Q. Before these three days where were you on duty?

A. In Tondo.

Q. How long have you been rendering services in Tondo?

A. More than a year.

Q. On Sunday, October 2nd, where were you on duty?

A. I was on duty in front of the Race Track, facing the judges' enclosure.

Q. What race track?

A. The San Lazaro Race Track.

Q. At what hour were you on duty there that day?

—. ——.

13 Q. At what hour did you leave your beat?

A. At half past six.

Q. What was going on at the race track on that day.

A. Horse racing.

Q. What clothes were you wearing on that day?

A. I was in uniform, with club and revolver.

Q. What uniform?

A. Police.

Q. Besides your uniform and the club, did you have anything else to distinguish you?
A. A badge.
Q. What was inscribed on your badge?
A. "Manila Police."
Q. Did you see the accused Flemister at the races on that day?
A. Yes, sir.
Q. What was the first time you saw him on that day?
A. When I first saw him he was walking around.
Q. When?
A. About three or four o'clock.
Q. After you saw him walking there, when did you next see him?
A. I saw him when he was climbing over the seats. The porter did not wish to let him pass. He insisted on climbing up and tried to get over the railing, breaking the latch of the railing. After that he attempted to climb higher, but the porter opposed it and did not want to let him pass. Then he grasped the railing and the
14 porter and pitched them below, breaking the railing. Upon seeing that I told him that I would arrest him, and he then said to me "God damned son of a bitch googoo," and punched me in the belly. After he had struck me other persons climbed up and I told him that he was under arrest. Then he began to shout, using insulting language. Later other people came, the first being Francisco Cruz, and the Captain. When the corporal arrived, Flemister struck Corporal Cruz on the chest saying to him "God damned son of a bitch googoo." Then Mr. Cooley arrived. When he got there he asked me what had occurred. I told him what had occurred. I wanted to arrest the accused, and he said if I wanted to arrest him I would have to get out a warrant because he said that no son of a bitch googoo could arrest him. That was what he said to Mr. Cooley. He talked in a loud voice, striking him on the chest, and telling him that no son of a bitch googoo could arrest him. When the captain arrived, I had stopped talking. Owing to the shouting of the accused, a crowd had gathered.
Q. Where was this railing or gate that you said the accused threw down?
A. On the same staircase where the railing was.
Q. On what part of the staircase—at the bottom or in the middle?
A. At the bottom.
Q. Where did this gate lead to?
A. It led toward the center, and to the side of the saloon.
Q. To what part of the enclosure did this staircase and
15 gate lead?
A. It lead to the enclosure.
Q. To what part of the enclosure?
A. Ascending to the top, it led to the left side of the enclosure.
Q. Why was the door placed at the left of the enclosure.
A. In order that the members might sit there.
Q. Who was in charge of this gate?
A. The man outside of the entrance.
Q. Do you know his name?

A. I do not know his name, but I know his sur-name is Salvador.

Q. When Flemister reached the gate and had this altercation with the porter, what distance were you from the gate?

A. I cannot say exactly, but I think it was two meters or two meters and a half.

Q. When you ascended the stair and approached Flemister what did you say to him?

A. I told him I was going to arrest him.

Q. What language did you use in talking to him?

A. I spoke to him in English.

Q. Did you do anything else? Put your hands on him or did you tell him only that you wanted to arrest him?

A. I took hold of his right arm and told him that I was going to arrest him.

Q. What did he say?

A. He said to me "God damned son of a bitch googoo."

16 Q. And then what happened?

A. He sat down and then Captain Crame and Corporal Cruz arrived.

Q. Where was he when you approached him and told him that you were about to arrest him?

A. He was already seated upstairs.

Q. When you ascended and first saw Flemister and took him by the right arm telling him that you were going to arrest him, where was Flemister?

A. We went together toward the seats and I told him to get down out of that place, but he seated himself there.

Q. How far from the place where he broke the gate was he seated?

A. A certain distance.

Q. What distance?

A. Seven or eight meters.

Q. When he struck you?

A. He was below, and when he struck me I told him that he was under arrest.

Q. And that was where you arrested him, and not above?

A. When I told him that I was going to arrest him he was below; he did nothing and kept ascending, and I followed him upstairs because I wanted to arrest him.

Q. How many times did he hit you?

A. Once.

Q. On what part of the body did he strike you?

A. In the pit of the stomach.

Q. What did the accused do after giving you this blow?

17 A. He continued ascending and I followed him telling him that he was under arrest.

Q. Did you succeed in arresting Flemister?

A. I did not accomplish the arrest because the Captain arrived and said that he would look after him.

By Mr. TERRELL:

Q. How long were you at the foot of the staircase that afternoon?
A. Three hours.
Q. Many people were ascending and descending the staircase?
A. The members were the only ones who could go up there.
Q. Are you ready to swear that on that afternoon the members of the Club were the only ones in the enclosure?

PROSECUTION: I object to the question as improper on cross-examination.

Mr. TERRELL: The witness has said that only members of the Club could ascend and descend and those who entered the enclosure were not members of the club.

The COURT: Objection overruled.

A. When the disturbance began and the gate broken, many persons gathered there.
Q. Before the gate was broken, had other persons entered, or only members of the club?
A. I saw that all who ascended showed a badge or distin-
18 guishing emblem, but I cannot say whether or not they were all members.
Q. There were other persons who went up and who did not bear the distinctive emblem prior to the breaking of the gate?
A. I do not know because I did not pay attention to that.
Q. As to the gate at the foot of the staircase where Salvador stood—was he at the gate at the foot of the staircase or was he outside?
A. He was the one who opened and shut the gate.
Q. Is it not true that before you got there and the accused pushed through the gate, you saw that the latch was already broken?
A. No, sir.
Q. When the accused approached the gate, how far were you from it?
A. Between two and a half and three meters.
Q. What was the first thing the accused did on approaching the gate?
A. He started to go up but was not permitted to pass, and then he seized the gate and raised it and broke the latch.
Q. When the accused reached the gate, he seized and opened it?
A. Yes, sir, and after opening it was when he went up.
Q. When the accused had opened the gate did he go up hurriedly or slowly?
A. He walked rapidly.
19 Q. On opening the gate he immediately started to go up?
A. Yes, sir.
Q. Is it not a fact that you followed him up?
A. No; he went the first time when I motioned to him; the second time was when he broke the gate.
Q. With respect to the second time, I ask you if that second time he approached the gate and had the altercation in opening it and

climbing into the enclosure, whether the accused went slowly or hurriedly?

A. At an ordinary pace.

Q. What do you mean by an ordinary pace—slowly or hurriedly?

A. A little slow.

Q. Then on that occasion he approached the gate and succeeded in opening it and climbing up?

A. Yes, he pushed the gate open, broke it and gave the porter a shove and ascended.

Q. How far were you from the gate?

A. Near.

Q. Were you between the accused and the gate to the stairway on some occasion?

A. I was in the middle. He ascended and I followed. The porter fell. I was between the porter and the accused, and when the accused ascended, I followed him, and it was then that he gave me a blow in the stomach.

Q. Where were you when he struck you? Were you standing or seated?

20 A. I was on the stairway with him.

Q. Were you not in front of Flemister on the stairway, or were you behind when he pushed the gate open?

A. I ascended and seized him, and then he gave me the blow.

Q. What did Flemister say to you when you seized his arm?

A. When I seized him I told him that he was under arrest.

Q. State the precise words that you said to Flemister at that time?

A. Mr. Flemister, you are under arrest.

Q. Then you recognized him at that time?

A. I did not know his name until now.

Q. Then you did not say "Mr. Flemister"?

A. No, sir.

Q. Why have you just said—that you said "Mr. Flemister, you are under arrest"?

A. It was in my hurry that I used the name.

Q. You followed Mr. Flemister up the stairway?

A. Yes; when he got up he sat down in a seat, and when the others arrived, he commenced to make insulting and scandalous remarks.

Q. You followed him to the seat?

A. Yes, sir.

Q. At what distance were you from him when he was seated?

A. I was at his side and near him.

21 Q. How far?

A. Some two feet approximately; I cannot state exactly.

Q. Did you see Flemister strike Domingo Salvador?

A. I saw him when he pushed the gate of the stairway open and I saw him when he pushed him and threw him down.

Q. The porter took hold of his hands?

A. He took hold of his hands and he pushed him.

Q. Prior to that occasion and after the second of October did you not testify before the Municipal Court against the same accused when you were asked by the Assistant Prosecuting Attorney what you saw with respect to the accused and his acts at the San Lazaro Race Track on the afternoon of Sunday, the second of October? Answer yes or no.

A. Yes, sir.

Q. You wish to say that in that trial the Assistant Prosecuting Attorney did not ask you this question: "What did the accused do and what was then said?" And in reply to this question you said "He seized the gate and shoved the porter." Answer if you did not say this.

A. I did not testify that he shoved him, but that he had a discussion with him.

Q. Was this not said to you: "Where did he shove the porter? What do you mean by that?" And did you not testify in this manner: "He pushed him in that manner (striking a person there in the side) and the porter fell, and then he seized him by the
22 right hand."

A. That was not my statement but that he had a discussion with the porter and tore down the railing.

Q. What did the porter say to the accused when the accused opened the gate?

A. I did not say anything. I only saw the act of opening and I followed the American.

Q. Didn't you hear that Salvador said something to the accused on that occasion?

A. I did not notice because I had my attention fixed on the accused.

Q. State whether in your testimony in the Municipal Court you were asked this: "The porter said something to the accused when the accused entered and prior to the breaking of the gate," and did you not answer this question in the following terms: "Yes, I seized his hands and told him that he was not a member of the club and he could not enter there?"

A. I did not do it because at that time I was occupied with the accused.

Q. Do you mean to say that you answered that question in that manner or not?

A. I did not answer him in that way because I was occupied in fulfilling my duty and not with what the porter was saying.

Mr. TERRELL: Nothing further.

The COURT: Next witness.

23 *Testimony of Francisco Cruz.*

Swears in legal form and says that his name is Francisco Cruz; that he is a resident of Gagalangin and is a policeman.

By Mr. GALE:

Q. How long were you on duty there?

A. Since April first, 1903.

Q. Were you on duty at the San Lazaro Race Track on the afternoon of October second of this year?
A. Yes, sir.
Q. Were you in uniform that day?
A. Yes, sir.
Q. Did you see a disturbance that occurred between the accused, the porter and the policeman Celemin on that afternoon?
A. Yes, sir; I heard the disturbance in front of the enclosure that afternoon, and I then ascended the judges' stand. On reaching the top I found the policeman Celemin. The Captain and Inspector Cooley also arrived at the same time to speak to the accused. Mr. Cooley talked with the gentleman and this gentleman (designating the accused) arose and with a closed fist and striking Mr. Cooley in the breast with his fist I heard him say these words: "Son of a bitch googoo."
Q. When you ascended the judges' stand, there were other officials there with Celemin?
24 A. No, sir.

By Mr. TERRELL:

Q. Immediately after your arrival at the stand, Captain Crame reached you?
A. Yes, sir.
Q. And you were there then with the Captain, the policeman Celemin and Mr. Cooley?
A. Yes, sir.
Q. When you arrived at the stand, where was Celemin? In what position was he with respect to the accused?
A. He was behind the accused?
Q. How far from the accused was he?
A. About a meter, more or less.
Q. While Celemin was standing behind the accused, you saw some resistance on the part of the accused, and the policeman Celemin put his hands on the accused?
A. I did not see anything like that when Mr. Cooley was talking.
Q. The policeman Celemin, when he was standing in front of the accused, put his hands on him?
A. He was behind and said that he should follow him to the station.
Q. And the accused was merely seated in the place?
A. Yes, sir; he was seated.
Mr. TERRELL: Nothing further.
The COURT: Next witness.

25 *Testimony of Antonio Acuña.*

Swears in legal form and says that his name is Antonio Acuña; that he lives in Gagalangin and that he is a corporal of police.

By Mr. GALE:

Q. How long have you been corporal of police?
A. Four years.

Q. What is your beat now?
A. It is in the Third Precinct of Santa Cruz.
Q. How long have you been on duty there?
A. Since the twenty-sixth of the past month.
Q. Prior to that date where were you on duty?
A. In Tondo.
Q. How long were you on duty in the District of Tondo?
A. I was there a long time.
Q. Were you on duty October second of this year, in the afternoon, at the San Lazaro Race Track?
A. Yes, sir.
Q. State whether you saw an altercation at the San Lazaro Race Track between the accused and the porter of the track.
A. I was below to maintain order and saw many people looking at the judges' stand from below. I then went toward the place and saw and heard a voice of the gentleman (designating Flem-
26 ister) on the stand and afterwards ascended to the stand and approached the policeman Celemin and asked him what had occurred, and the policeman Celemin told me that he was arresting the gentleman (designating the accused) because he had broken the gate. When he was arresting the señor I approached the accused and this gentleman, without my saying anything, pushed me, saying "Son of a bitch googoo" and it was then that the Captain arrived. When the Captain arrived he was talking with him and with Mr. Cooley, and this gentleman (designating the accused), when he was talking with Mr. Cooley, struck him with his fist on the chest and said "Son of a bitch googoo" (designating all who were there gathered). When the Captain was there I did not say anything.

By Mr. TERRELL:

Q. What was the accused doing when you arrived; was he seated or standing?
A. When I arrived, he was standing.
Q. Did you get there before or after de la Cruz?
A. I cannot tell you because I did not particularly notice. I afterwards saw the policeman Cruz.
Q. Do you know the precise place where the accused was standing?
A. He was standing when I reached him.
Q. He sat down the moment you got there and before the arrival of Captain Crame?
A. At the time of the arrival of Captain Crame I left and at the same time he pushed me.
27 Q. With respect to the accused where were you and Captain Crame?
A. I did not take particular notice. There were many people there. I saw Celemin.
Q. Where was the policeman Celemin standing with respect to the accused?
A. The accused was here (designating) when I arrived.
Q. You were at the side, in front, or behind the accused?
A. At the side of the accused.
Q. The accused was standing looking toward the track?

A. He was in front.
Q. When you went toward the accused did you pass at his left side?
A. I went toward the other side toward him.
Q. When you arrived, where was the accused? Was he standing between two rows of chairs?
A. Yes; between the chairs.
Q. When you approached him, you came down the same aisle in which he was standing, or did you pass between another file of chairs behind?
A. Past some benches behind.
Q. Did you pass from below to the top or from the top to the foot?
A. I came from below to the top.
Q. Then you passed above the chairs?
A. Above the chairs because they were not very close together there.

28 Q. Does the witness mean to say that in approaching him and when he was struck he came from above and not from below?

A. It was in descending that he pushed me from where he was standing.
Q. When you approached the accused, where did you come from?
A. From below.
Q. Well, then, when you ascended, you passed a file of chairs in order to reach him, or did you pass behind the chairs?
A. Behind the chairs. There were some benches there, and I went there and as I could pass and was already near the accused, and as he was below, it was in this position that we were when we were talking.
Q. Then you approached the accused from behind?
A. Yes, as if I followed him.
Q. On which side of the accused was the policeman Celemin standing?
A. When I arrived he was in this place (designating).
Q. At the right or left?
A. At the left.
Q. Then when you arrived and approached the accused the policeman Celemin was standing between you and the accused?
A. The policeman Celemin was standing when I arrived—Celemin between me, the accused and the Captain.

29 Q. When you arrived Celemin was between the two of you?
A. Yes, sir.
Q. When you ascended and passed among the benches, you passed between Celemin and the accused?
A. I did not make turns to approach Mr. Flemister. I went straight to the side of Celemin.
Q. You asserted that Celemin was standing between two files of chairs?
A. Yes, sir; at the same place.
Q. You have said that when you approached him (Flemister)

you told him that he must follow you to the station, and then he hit you?

A. When I told him that he should follow me to the jail.

Q. At that moment?

A. Yes; when he struck me with his closed fist.

Q. On the judges' stand?

A. Yes, sir.

Q. Did he injure you?

A. No, because it was nothing more than a push.

Q. When you approached the accused there was another person standing with him—with the accused?

A. There were a great many persons there; there was a crowd.

Q. Is it not true that when you ascended there was a race going on on the track?

A. The race had been ended.

The COURT: The trial is suspended until Monday, at 8 a. m.

30 DECEMBER 5TH, 1904.

The COURT: The trial will continue.

Testimony of Domingo Salvador.

Swears in legal form and says that his name is Domingo Salvador, and that he is a porter at the San Lazaro Race Track.

By Mr. GALE:

Q. How long have you been employed as a porter at the track?

A. Since it was first opened.

Q. Prior to this date did you know or see the accused Mr. Flemister?

A. Before?

Q. State whether you saw the accused Flemister Sunday, October second of this year?

A. At the San Lazaro Race Track.

Q. What occurred between Flemister and yourself on that date?

A. Flemister wanted to ascend the stairway to the enclosure for the members. I told him that he could not ascend and he undertook to pass. As I was the porter and have orders to let no one but members pass there, I held the gate, but he seized it and broke the latch. When the latch broke, the gate fell, and I also fell
31 at the same time. Seeing that the gate was opened he started to ascend. He had before attempted to go up and had actually ascended and he later returned to descend and still later he returned to go up again, and it was when he was below that I saw the policeman arrest him.

Q. What policeman was that?

A. The policeman Celemin.

Q. State what occurred between the accused and Celemin?

A. I saw Celemin approach the accused and tell him that he must

not ascend, and what the accused did was to give him a shove saying to him "Son of a bitch googoo."

Q. In what part of the body did Flemister hit Celemin?

A. In the stomach.

Q. How long were you on duty at that gate which leads to the members' enclosure?

A. I was there from two o'clock.

Q. How long were you there on duty?

A. More than a year.

Q. What is your position?

A. I am gate-keeper.

Q. What are your duties or the duties that you have to perform when you are at that gate?

A. I am keeper of the gate and have orders to permit no one but members to enter.

Q. Can you distinguish members from those who are not members?

32 A. They wear an emblem with a horse and horse-shoe.

Q. On that day they wore this distinctive emblem?

A. No, sir.

Q. How long was the accused detained from entering the first time he ascended to the stand, when he broke the hinges, and the second time that he ascended?

A. I cannot say precisely because I have no watch.

Q. Roughly?

A. More than half an hour.

Q. State if this is the gate mentioned in your testimony (designating the gate exhibited)?

A. Yes, sir.

Q. What condition was this gate in the first time the accused ascended—was it in good condition.

A. Yes, it was in good condition.

Q. Which hinge was it that he first broke—the upper or the lower one?

A. The upper one.

By Mr. TERRELL:

Q. You were stationed at the foot of the stairway, at the end of the enclosure, near this gate?

A. I was at the top of the stairway.

Q. From where you were stationed there, do you know when that gate at the foot of the stairway was put in position?

A. I do not remember how long it had been there.

33 Q. Is it not a fact that this gate was put there only two or three days in the month of October and prior to that there was no gate whatever?

A. Not two days only; the gate was put in position when the enclosure was divided.

Q. How long were you on guard at this gate at the foot of the stairway prior to this Sunday, the second of October?

A. I was on guard there a long time.

Q. Do you mean to say to the Court that you were there on guard at this gate at the foot of the stairway a long time?

A. Yes, sir.

Q. Do you know the penalty a person who does not tell the truth and commits perjury incurs?

PROSECUTION: I object to that question. Its purpose is to intimidate the witness, and there is no reason for it. If this witness gives false testimony, he can be proceeded ag-inst for perjury.

The COURT: This witness seems to be testifying in a positive manner. I understand what the defense wishes to bring out, and will ask the witness some questions:

By the COURT:

Q. Do you know the importance of the oath which you took before giving this testimony?

34 A. Yes, sir.

The COURT: I also understand that this question which has been asked the witness was not put with the purpose of intimidating him but to ascertain with certainty the truth of his testimony.

By Mr. TERRELL:

Q. Who gave you orders to watch over the gate at that place?

A. The manager.

Q. This occurrence took place the second of October and at the time you were charged with the duty of watching the gate of the stairway?

A. I do not remember the date.

Q. Can you state approximately how long before the second of October you received these orders?

A. It was when the enclosure was divided that I received that order.

Q. Is it not true that it was on the second of October when you received that order to watch the enclosure? That is, the first time that this gate was in position was that Sunday?

A. Not that day only, but prior to that day I was at the gate.

Q. How long prior to that day were you at the gate?

A. I cannot remember the date.

Q. Is it not true that you were in some other part of the

35 enclosure and that this gate was not put in position at the stairway until that Sunday?

A. When I was stationed there, the gate had already been placed in position.

Q. You have testified that you were watching this gate for approximately a year?

A. Yes, sir.

Q. Before this date you were watching that gate at the foot of that stairway during the last year?

A. Yes, sir; always when there were races I was there.

Q. Do you not know that that gate was placed in position lead-

ing to another gate through which the members passed, before the second of October?

A. No; there was no other gate there.

Q. Are you sure that you were there at the foot of that stairway watching for a year?

A. That gate was placed there when the enclosure was divided.

Q. How long was that—you have said that it was two months or a year?

A. I do not remember when the enclosure was divided. It was when the enclosure was divided that the gate was put there.

Q. Why have you said that you were watching that gate for about a year?

A. I cannot tell the date; that gate was put there when the enclosure was divided, and was there when I was stationed
36 to watch it, because I had formerly been in the stable.

Q. Before the enclosure was divided you were employed in the stables?

A. Before the enclosure was divided I was in another place, and it was when the division of the enclosure was made that I was put there to watch the gate.

Q. Is it not true that only a week before the accused Mr. Flemister tried to pass through the gate you had been put there to watch the gate?

A. Not a week only.

Q. According to your best recollection, you were employed there a year?

A. I cannot state, but when the division of the enclosure was made, I remember very well.

Q. You said more than a week or more than two weeks?

A. I do not remember how many weeks.

Q. More than half a year?

A. I do not remember.

Q. How can you remember that it was a year prior to this time?

A. When this occurrence of Mr. Flemister's happened, I had already been there a long time.

Q. And how do you know that it was put there two months or a week prior to the Flemister occurrence?

A. Because I was there more than a month and more than a week.

Q. You know that it was more than a week, but you do not remember whether it was more or less than a week?

37 PROSECUTION: I object to the question on the ground that it is immaterial and not proper cross examination, and furthermore the attorney is making a constant repetition.

Q. Can you state if it was more or less than a week?

A. It was a long time.

Q. State whether you did not testify the eleventh of October, 1904, before the Municipal Court in the case in which Flemister was the defendant, if you answered questions put to you by the prosecu-

tion, and under oath with respect to this occurrence of October second?

A. Yes, sir.

Q. Is it not true that you said that you were at that gate when the accused arrived, and that when the gate was opened you had hold of it, and closed the gate after you?

A. Yes, sir.

Q. The accused descended with you at that time?

A. No, sir.

Q. How long before this occurred was it that the policeman Celemin came?

A. I do not remember. It was after I fell with the gate that the policeman approached the accused.

Q. The policeman Celemin was at the gate near you or was outside of the gate?

A. He was outside.

Q. When the accused opened the gate, he immediately ascended to the stand?

A. Yes, sir.

38 Q. You saw the policeman Celemin approach the accused when he ascended the stairs?

A. I heard him say that he could not ascend.

Q. That was all he said?

A. Yes, sir.

Q. Those were the precise words he said?

A. That was what he said; that he could not ascend.

Mr. TERRELL: Nothing further.

The COURT: Next witness.

Testimony of Faustino Villanueva.

Swears in legal form and says that his name is Faustino Villanueva, and that he has charge of the Judges' Stand at the San Lazaro Race Track.

By Mr. GALE:

Q. How long have you been employed at the San Lazaro Race Track?

A. More than three years.

Q. Are you acquainted with the porter Domingo Salvador?

A. Yes, sir.

Q. How long has he been employed at the race track?

A. One year, more or less.

39 Q. What special duties has he there?

A. On ordinary days I make him work, and when there are races, I put him in charge as porter.

Q. Where was he acting as porter during the racing days?

A. At the entrance to the Judges' Stand.

Q. At what stand — you put Domingo Salvador to work as porter?

A. At the enclosure, which leads to the members' stand.

Q. How long approximately was Domingo Salvador on duty at that gate to the members' stand?

A. I do not remember exactly, but I believe it was two or three Sundays.

Q. What were his duties as porter at that gate?

A. He had orders to permit no one but members to enter the enclosure.

Q. How could he recognize members?

A. By means of an insignia which members wore.

Q. You saw there on October second the occurrence which took place with the accused Flemister at that gate?

A. Both times.

Q. What did you see?

A. On going to examine the porter I asked him why he permitted him to ascend, and the porter said that he had not been able to stop him, and that he had taken hold of the gate and broken it.

Q. When did you go to examine the gate?

40 A. At the end of the race?

Q. What day?

A. Sunday; I do not remember the date. On that day, when this occurred, I went and gave information to the manager about the matter, and the manager told me to find Captain Crame. The latter I found in a yard and told him that on behalf of the judge of the Club I requested him to make a statement of what had occurred at the gate. I went with Captain Crame to the gate and showed him him how it had been broken. From there Captain Crame went to speak to somebody. I do not know what he said, but he was asking who broke the gate. The accused intended again to ascend, and Domingo Salvador told him that he could not go up; that the stand was for members only. Then the accused Flemister went and seized the gate and threw it down and I went again to tell Captain Crame about the occurrence. While Captain Crame was there, I heard him talking with the accused and other Americans.

By Mr. TERRELL:

Q. By virtue of your office there, you have charge of the gate to this establishment?

A. Yes, sir.

Q. When did you put this gate at the foot of the stair?

A. Approximately three weeks.

Q. You saw the accused seize Domingo Salvador and push him below?

41 A. Yes, sir.

Q. Immediately after that you went to see the judge of the races and tell him what had occurred?

A. I saw the policeman telling him that he must not go up.

Q. The policeman followed him upstairs?

A. Yes, sir; upstairs.

Q. Followed him to the enclosure?

A. Yes, sir.

Q. The policeman did not get there until the accused threw Salvador down?

A. I cannot tell you about the first time because I saw only the second time.

Q. The second time?

A. Yes, sir.

Q. When Salvador was knocked down, did he fall at the same time as the gate, or afterward?

A. First the gate fell and then Salvador.

Mr. Terrell offers to the Court a judgment rendered against Mr. Flemister in case number 962 for assault, stating that as the judgment in this court was for the same act prosecuted in the case at bar, it should be taken cognizance of.

The prosecution stated that the accused had actually been sentenced for this crime, but that this cause was still pending in
42 the Supreme Court, and that final judgment had not yet been entered.

The COURT: As the judgment rendered in case number 962 against the accused Flemister is still pending on appeal, it cannot be taken into consideration by the court as a qualifying circumstance of responsibility with respect to the said cause.

Testimony of José Crame.

Swears in legal form and says that his name is José Crame, and that he is a Captain of Police of Tondo.

By Mr. GALE:

Q. How long have you been a Captain of Police?

A. More than three years.

Q. As captain of your district are you obliged to attend the San Lazaro Race Track and to maintain order during the races?

A. Yes, sir.

Q. Were you acquainted with the policeman Celemin?

A. Yes, sir.

Q. How long?

A. From the time he was transferred to my precinct?

Q. When was that?

A. I cannot state precisely the date, but I believe it was
43 during the past year or the year before.

Q. From that time he has been employed as a policeman?

A. Before that time he was a policeman, I believe, of the district of Manila, and afterwards was transferred to my district and was then under my orders, but I knew prior to that time that he was a policeman.

Q. Where was the policeman Celemin on duty October second, Sunday afternoon?

A. At the San Lazaro Race Track.

Q. What were the duties he was supposed to perform?

A. To maintain order. He was on duty at the enclosures and in

different places. The policeman Celemin was in front of one of the enclosures?

Q. At what hour did he go on duty that day?

A. At two o'clock in the afternoon.

Q. How was he dressed that afternoon?

A. In uniform.

Q. What uniform did he wear—the regular uniform of the police department?

A. Yes, sir.

Q. Did he have any other distinctive insignia?

A. He had a cap, badge and club.

Q. Were you there that afternoon?

A. I was at the San Lazaro Race Track.

Q. Did you see the accused there that afternoon?

A. Yes, sir.

44 Q. State what you saw and what occurred to the accused that afternoon?

A. I was in the exterior part of the San Lazaro Race Track when an employee of the track came to me on behalf of the judge Señor Peña to request that I intervene with an American who had struck the porter in charge of the gate, and which he had broken. I told him to show me the place where the occurrence had taken place, and accordingly saw that the gate had been broken—the hinges, the porter stating that an American who wished to ascend and whom he had told could not ascend because the enclosure was for members only, had broken. Then I told the porter to show me the American who had broken the gate and he pointed out the accused who was seated above on the stand. I told the porter we would wait until the race should be ended and that when the American descended I would put a policeman there at his side to prevent his ascending in case he should attempt to do so. The accused descended to the paddock and I called the policeman Celemin who was on duty at the place and told him to station himself at the side of the gatekeeper, and that when the American or any other person not a member should try to go up, he should tell him he could not go up for the reason that the enclosure was for members only. After that I went away, but a half an hour had not passed when I saw a crowd begin to gather at the stand, and began running because an American was fighting with a policeman. I ascended to the stand where I

45 heard the voices. The accused was seated, talking to those at his side. Celemin and the policeman Cruz were behind. As I do not talk English, in order to make myself understood, I saw near there Mr. Cooley who is a member of the Secret Police, and I asked him to interpret for me with the accused. Mr. Cooley started to talk with the accused, and the latter began to reply in a loud voice. He said many things the greater part of which I was unable to understand, but I am certain that he shouted out "Son of a bitch Googoo."

Q. Are you a member of the Jockey Club?

A. Yes, sir.

Q. How long have you been a member of the Jockey Club?

A. Yes sir.

Q. Prior to October second were you acquainted with the accused Mr. Flemister?

A. No, sir.

Q. Do you know whether or not he was a member of the Jockey Club on that date?

A. I cannot tell you for I do not know from memory all the members, but I do not believe that he was a member from what the employee of the track told me.

By Mr. TERRELL:

Q. Do you know if the accused had horses to race at the San Lazaro Track?

A. I do not know anything about it.

Q. Say if the badge which members of the Jockey Club wear may be obtained at Preisler's, on payment of a peso, and if the
46 purchase of this emblem only is sufficient to obtain entrance to the enclosure?

A. As to that all I can say is that as a member told me, the emblem of the society may be bought for a peso, and I know no more than that. The emblem is a horse-shoe with the head of a horse.

Q. When you noticed the gathering of the crowd, a race was not starting?

A. Yes, sir.

Q. Is it not customary, before a race begins, for a crowd to gather in the place from which they can best see the finish of the race?

A. Yes, sir, but from the place occupied by the members it can be seen.

Q. Which of the policemen was there when you reached the enclosure and found the accused?

A. I found the policeman Celemin and Corporal Cruz.

Q. When you reached the place where was the policeman with respect to the accused?

A. When I reached the stand——

Q. The accused was between the policeman and the gate?

A. I wish that the attorney would tell me clearly to what he refers.

Q. The accused struck you or intended to strike you?

A. No, sir.

Q. I hand you this complaint and ask you if it was presented and signed by you?

47 A. Yes, sir.

Q. Case 2408 was signed and sworn to by you?

A. Yes, sir.

Q. State whether this complaint which you have sworn to does not refer to the same acts committed on that day?

The PROSECUTION: I object to the question as calling for a conclusion of the witness, and it is a fact for the Court to determine.

Mr. TERRELL: No attempt is being made to ask or find out the opinion or conclusion of the witness. What is sought is to ascertain

whether this defendant has been accused of the same crime committed on the same date, and whether in this case the accused will be put in jeopardy. If he has already been charged with this crime, it is useless to go ahead with this case.

The COURT: Objection overruled. As to the contention of the defense with respect to jeopardy on the ground that a judgment has been rendered in the Municipal Court, when this shall appear during the trial, the Court will enter the proper order.

A. No, sir.

Q. These two complaints—when you filed and swore to them under oath, embody the same facts which you witnessed that
48 afternoon?

A. The Court required me to relate what had happened, and I related it.

Q. That afternoon did the accused strike you or strike anybody in your presence?

A. No, sir.

By Mr. GALE:

Q. What was your reason for desisting from arresting the accused that afternoon?

A. The idea was to avoid a conflict there at the track, because there was a crowd present at the track and this was necessary for they would have been molested by a fight. In order to avoid a greater disturbance, the accused was not arrested at that time.

Q. There was a big crowd at the enclosure?

A. Yes, sir; it was full of people.

Q. There were women and children?

A. Yes, sir; there were women and children. The whole crowd gathered there and if I had put my intention to arrest the accused into effect, there certainly would have been considerable disgrace.

The COURT: The trial is suspended until tomorrow at 8 a. m.

49 DECEMBER 6, 1904.

The COURT: Let the trial be resumed.

EVIDENCE FOR THE DEFENSE.

Testimony of Mr. J. Taofilder.

Swears in legal form and says that his name is J. Taofilder, and that he is a carpenter in the Government Ice Plant.

By Mr. TERRELL:

Q. Are you acquainted with the accused Mr. Flemister?

A. Yes, sir.

Q. How long have you known him?

A. Year.

Q. Were you at the San Lazaro Race Track the second of October of this year?

A. Yes, sir.

Q. Were you there when the assault took place?

A. Yes, sir.

Q. State in your own words what you saw with respect to Mr. Flemister on this date of October 2nd, when you were on the left hand side of the stand?

A. I came from the stable to the stand and was at the entrance between the bar and the stand, and I saw Mr. Flemister who was walking toward the corner leading to the stand, turn the corner to ascend to the stand, passing in front of me. He was lost to my
50 view, but in a short time I saw a crowd gather at that place. At first sight I thought that something had happened because I heard Mr. Flemister. I could not see him but I recognized his voice which assured me that it was he. On hearing the voice I hastened to see what had occurred to Flemister, and was on the stair four steps from the top walking hurriedly and followed by a policeman who was also ascending the stair. I went to the top and saw a man who seemed to be a guard, but this Filipino did not detain Mr. Flemister. Mr. Flemister passed and walked leisurely to the enclosure, and toward that part where I believe there was no gate. There was another policeman standing there, and Flemister passed this second policeman. Then an effort was made to prevent Flemister's passage and then he was again lost to my view, having turned the corner to go up. When I arrived there, I saw Flemister seated on the stand with crossed arms, and with one knee over the other. He was smoking at the time, and with the left hand took the cigar from his mouth. The policeman was standing in back of him, Flemister's shoulder reaching to the waist of the policeman. Many people were standing on some steps higher up and talking with Flemister. Mr. Flemister did not appear to be talking but made signs with his left hand, and I thought that it was nothing but an order that he should leave. An official of the police, Captain Crame, who was dressed in white, but I did not notice that he carried any
51 badge and believed that he was an officer of the club, went up. I then spoke to a friend who told me that this gentleman would settle the matter and that everything would be all right. I then turned away and left.

Q. From the time you saw Flemister on the stairway to the time you lost sight of him and he reached the top of the stair, did Flemister intend to strike or did he strike any person?

A. There did not appear to be any person to interfere with him but only followed him up.

Q. When you saw him on the stair, and when you lost sight of him, up to the time when you saw him above when he was seated in the chair, how much time elapsed?

A. I believe that there were some two or three minutes.

Q. From the moment that you saw him seated up to the arrival of Captain Crame, did you see the accused strike anybody?

A. The only movement that I saw him make was motions with his hands.

Q. Was he seated or standing when Captain Crame approached him?

A. He was seated.

Q. When he ascended the stairway, did he use abusive or profane language?

A. All I heard him said was "Como no puedo?" (Why can't I?).

Q. How long have you been employed as a carpenter?

52 A. I was in a warehouse office when I was fourteen years old. I remained there three years learning my trade. I was employed a year in Germany before coming to the United States. I have worked in the United States, and for four years I have been in the Government Ice Plant.

By the PROSECUTION:

Q. You have said that the crowd approached the place where Flemister was and gathered near that spot

A. Yes; I saw the people go to that place.

Q. And what first attracted your attention?

A. The voice of Flemister, whom I heard say "Como no puedo?"

Q. How is it that those words of Flemister's "Como no puedo?" attracted your attention?

A. Because I knew Flemister's voice and as there had previously been a fight in the yard behind, I thought there was also a fight there.

Q. So that you presumed it was Flemister when you heard his voice, and that there was a fight there?

A. It is natural because I heard his voice "Como no puedo?" The man was out of my view. I did not see that anything serious occurred to any of the persons. Flemister had been drinking previously, but was not drunk. He was jovial and I had talked with him during the afternoon when the occurrence took place. He talked with me two or three times.

53 Q. You noticed that he had been drinking?

A. He had been drinking but he was not drunk.

Q. But he was under the influence of liquor?

A. I cannot say that he was under the influence of intoxication.

Q. How do you know that he had been drinking?

A. Because I saw him at the bar several times with friends.

Q. When you went to the place where Mr. Flemister was, where was the gate?

A. I did not see any gate because I was only looking above toward Flemister.

Q. You said that Flemister was four steps from the top when you saw him for the first time?

A. Yes, sir.

Q. Then you did not have to look up?

A. Flemister ascended the stair and I went to the side of the stair, and I had to look up in order to see him, because I was close to the stair.

Q. You saw the porter, then?

A. No, sir.

Q. Didn't you see anything that occurred between Flemister, the porter and the Filipino policeman?

A. I saw all that occurred between Flemister and the Filipino policeman when he ascended the stair.

Q. You saw the gate?

A. No, sir.

Q. Did you see Flemister pull down the gate?

54 A. No, sir.

Q. When Mr. Flemister broke down the gate, did you see what happened between the policeman, the porter and Flemister?

A. I have already told you that I did not see anything. I only saw that he was ascending the stair.

Testimony of Mr. J. P. Jones.

Swears in legal form and says that his name is J. P. Jones; that he lives at number 61 Real Street, Ermita, and is an electrical railway constructor.

By Mr. TERRELL:

Q. You are engaged in the construction of the electric railway of the city of Manila?

A. Yes, sir.

Q. Are you acquainted with the accused Mr. Flemister?

A. Yes, sir.

Q. Please state whether on the 2nd of October of this year you were at the San Lazaro Race Track?

A. Yes, sir. I was at the San Lazaro Race Track the day that altercation took place, but I cannot remember the date.

Q. You saw Flemister on that occasion?

55 A. Yes, sir.

Q. State where you were with respect to the gate there and what you saw happen with respect to Flemister?

A. I was above in the enclosure in the place intended for members. There are two gates and between these two gates there is a distance of some three feet, and I was in this place opposite or in front of the gate leading to the other enclosure.

Q. Was your attention called to the gate?

A. Yes, sir.

Q. What attracted your attention to this gate?

A. The first time that I noted this part of the gate was when the gate was opened and broken from its hinges.

Q. Was your attention again drawn to this gate?

A. Yes, sir.

Q. In what manner?

A. The second time my attention was attracted I saw Flemister going toward the stair and that he placed his hand on the gate to force it open; I do not know whether he succeeded or not. When he opened the gate it fell down and he passed to the other side of the enclosure and mounted the stair.

Q. From the moment that Flemister put his hand on the gate

up to his arrival at the head of the stair, you observed him all the time?

A. Yes, sir.

Q. Is it not a fact that you were above—a little to the left and a little higher than he?

56 A. Yes, sir.

Q. At the moment when Flemister put his hand on the gate, he struck or attempted to strike some person?

The PROSECUTION: I object to that question as leading and calling for a conclusion of the witness.

The COURT: The question seems somewhat leading.

Q. What did Flemister do when he opened the gate and ascended to the stand?

A. He went up the stair.

Q. He went up alone or accompanied by some one?

A. He went up alone.

Q. When Flemister ascended that stair did he shake his fist at any person?

A. From the moment that he passed the stair, there was no person who could shake his fist until he ascended the stair.

Q. After having opened the gate, did Flemister strike a policeman?

A. No, sir.

Q. Flemister struck or did not strike a Filipino after opening the gate?

A. I did not see him strike any one.

Q. You have said that you were observing Flemister from the moment that he opened the gate until the moment that you lost sight of him. If you have seen this, you ought to have noticed

57 whether he struck any one?

A. I did not see him strike any one.

Q. While Flemister was ascending the stair, did you hear him use any strong or insulting or in any way blasphemous word?

A. No, sir.

Q. From the place where this gate was to the place where he was standing, how far were you in a direct line?

A. Some fifty feet.

Q. Do you know whether, when this occurrence took place, a race was in progress?

A. When this happened, the horses were ready to start.

Q. Is it not a fact and custom in this race track, whenever the horses are ready to start on a race, for the people to place themselves in the best positions, gathering together the better to observe the race?

The PROSECUTION: I objected to that question as leading.

The COURT: Objection overruled.

A. Yes, sir.

By the PROSECUTION:

Q. When the public is present at the races, do the people stand with their backs to the enclosure, grouped together, taking position

to see the races with their backs toward the enclosure and looking toward the track?

A. Yes, sir. It is natural that they should so place themselves as to be facing the track. Some people pass through this gate
58 to go up the stair and remain backed up against this gate of the enclosure looking toward the place where the horses run.

Q. How long were you there on the stand when this occurred?

A. Approximately an hour.

Q. And you were there in order to see the races?

A. Yes, sir.

Q. During the time that you were there you saw the persons who ascended, that they were taken for members on entering the gate?

A. No, sir.

Q. Did you see Flemister?

A. Yes; I saw Flemister.

Q. Did you see other people?

A. I saw several people go up through the gate.

Q. Did you observe how they opened the gate?

A. I cannot say.

Q. Were you interested in the races which began then?

A. No, sir.

Q. You had no interest of any kind?

A. No, sir.

Q. How do you know that the races were beginning?

A. I was in the gate of the enclosure where I could see them.

Q. How did you notice what occurred to Flemister on this occasion?

A. I was casually standing at the side of the stand, resting
59 my arm on the rail, near the place where this gate was.

Q. There was nothing there to attract your attention?

A. I cannot say that there was anything to attract the attention.

Q. Did you observe other persons there with the porter then?

A. No, sir.

Q. There was nothing at the gate?

A. No, sir.

Q. Flemister violently opened the gate toward the side of the stand?

A. I did not observe anything with respect to the manner of taking hold of the gate.

Q. Did they force the gate open and tear it off the hinges?

A. No, sir.

Q. Did you see Flemister tear the gate from its hinges?

A. No, sir.

Q. He simply opened the gate?

A. He put his hand on the gate as if to open it, and moved the gate, and it was in simply moving it, I think, that it fell.

Q. Do you mean that the gate was simply hanging from its hinge?

A. Yes, sir.

60 Q. This was the first or the second time that you saw Flemister ascend to the stand?

A. The only time that I saw Flemister in the enclosure.
Q. You saw him before that?
A. Yes, sir.
Q. Where?
A. He was in the yard for the horses.
Q. When you saw Flemister try to open the gate, did you see him break the hinges?
A. I cannot say, but I do not believe that he did so.
Q. When you saw him go up the steps, were you around and saw no excitement?
A. I did not see any excitement there. I saw nothing more than the people gathering to ascent to the stand and watch the races.
Q. You did not see any porter there?
A. I saw no porter.
Q. Didn't you hear Flemister say anything?
A. No, sir.
Q. You did not hear him say "Como no puedo"?
A. I did not hear anything, and if I had heard him, I would not have understood what it was.
Q. You did not hear him say anything?
A. No, sir.
Q. Not a single word?
61 A. No, sir.
Q. If he had spoken, you would have been able to hear?
A. I think so.

By Mr. TERRELL:

Q. Did you see any policeman follow Flemister when he ascended to the stand?
A. When Flemister was there on the third step, I saw a Filipino civilian follow Flemister.
Q. Do you mean to say that it was a Filipino policeman?
A. I am not certain whether or not he was a policeman.
Q. Prior to that occasion did you notice this gate?
A. Yes, sir.
Q. And prior to that time was there anything about that gate to attract your attention to it?
A. Yes, sir; the gate was unhinged and fallen, and lying on the steps.

Testimony of Mr. E. Lauser.

Swears in legal form and says that his name is E. Lauser; that he lives in Manila and is a Government employee, Military
62 Division.

By Mr. TERRELL:

Q. Are you acquainted with the accused?
A. Yes, sir.
Q. Were you at the races at the San Lazaro Race Track October second of this year?
A. I was there when the occurrence took place.

Q. Where were you seated when this occurrence took place?
A. I was seated on the stand some forty feet from the stair.
Q. From the place where you were on the stand, did you see Mr. Flemister?
A. I saw him before and he ascended higher up the stair.
Q. You observed him during the time he ascended the stair to the place where he sat down?
A. Yes, sir.
Q. When you were seated, how far were you from the place where he was seated?
A. He was some fifteen feet behind me.
Q. State to the Court all that you saw with respect to Flemister from the moment that you saw him there on the stair?
A. The first time my attention was attracted was when Flemister reached the top of the stair; because of a very loud conversation I turned my head and saw Flemister who was on the stair of
63 the enclosure. There was a Filipino policeman there about three or four paces behind him talking to him. What they were talking about I don't know. Evidently they were trying to prevent his going up to the stand, and Flemister was talking but did not do anything to the policeman. He went directly to the place that I have indicated before toward the right, and there sat down. I believe that the policeman said that he would eject Flemister from the stand; that he did not want to do it, but that the stand, the policeman said, was for members only. Flemister told him that there were in the stand other persons who were not members and that he was not going to leave it until the others who were not members were also ejected. Then there was a very loud conversation and at this moment the race began. That is all I observed.
Q. After Flemister was seated, where was the policeman seated?
A. The policeman was behind him; he followed him.
Q. Are you a member of the Jockey Club?
A. No, sir.
Q. Was any effort made by the employees of the track to make you leave the stand?
A. No one said anything to me.
Q. Were you in the same part of the stand where Flemister was?
A. Yes, sir.
Q. Were there other persons in this stand who were not members?
A. Yes, sir.
64 Q. Did Flemister strike any person there in the stand that you saw?

The PROSECUTION: I object to that question.
The COURT: Objection overruled.

A. I saw Flemister who, from the time he entered the stand until he sat down, was followed by a policeman at a distance of some three or four steps. The policeman followed with the appearance of being about to attack him. I observed the policeman, and saw that he pulled the accused two or three times although he did nothing in order to prevent the accused from ascending. The accused,

however, continued going up and said something to the policeman. They spoke together but I did not see, and I know that Flemister did not touch the policeman.

Q. You had your attention fixed on that occasion from the time Flemister entered the stand until the matter was terminated?

A. Yes, sir.

By the PROSECUTION:

Q. What is it that attracted your attention and caused you to look up the stair?

A. A loud conversation.

Q. Who was it that talked in this unseemly manner?

A. Flemister and the policeman who followed him.

Q. After Flemister sat down, did other policemen not
65 come?

A. Yes, sir.

Q. Among them was there not a sergeant, very dark complexioned, one of whose eyes was a little crossed?

A. I did not notice that.

Q. Did you see the policeman who has just risen here (designating Corporal Acuña)?

A. Yes, sir; I saw him there, but I do not know whether he was a corporal or what he was.

Q. Did you see this man when he approached Flemister to talk to him?

A. I do not know who talked with him.

Q. Were you there when Captain Crame and Mr. Cooley arrived?

A. Yes, sir.

Q. Did you hear the conversation which took place between the accused, Captain Crame and Mr. Cooley?

A. They did not talk loud enough to enable me to hear them.

Q. You heard Flemister talk with them?

A. I could not hear what he said.

Q. You could not hear the words he said?

A. I could not say precisely.

Q. Flemister arose when Captain Crame and Mr. Cooley arrived?

A. Yes, he arose to talk with me.

Q. What was his condition at that moment?

66 A. He was very much worked up.

Q. Before Cooley arrived, was he not calm?

A. He was somewhat excited when the Filipino policeman arrived.

Q. Was he calm and did he treat the policeman civilly?

Mr. TERRELL: I object to the question as calling for an opinion of the witness.

The COURT: Objection overruled.

Mr. TERRELL: Exception.

A. He was sufficiently cool and treated him with courtesy, but he seemed to be somewhat enraged.

Q. Are you acquainted with Lierson of the Constabulary?

A. No, sir.

Q. Do you not recall having seen there a lieutenant of the Constabulary, seated near you?

A. It seems to me that I do—that there was there a Constabulary lieutenant.

Q. At what distance?

A. I do not remember as to whether he was seated. I saw him behind and he seemed to be well informed as to what was going on, and attracted my attention by interfering in the matter, but I thought that he was an officer of the San Lazaro Race Track and that he was trying to cause Flemister to leave.

Q. That day did you go alone to the races?

A. No, sir.

67 Q. Whom did you go with?

A. I went with Nelson.

Q. There were other persons in your company there?

A. No, sir.

Q. Why did you go up into the stand which was intended only for members?

A. I simply went up and no one ever prohibited my entering the stand. I always go there.

Q. You frequent with regularity the San Lazaro Race Track?

A. Yes; at that time, yes.

Q. During what time did you frequent this place?

A. Approximately a year.

Q. Are you acquainted with any of the members of the Jockey Club?

Mr. TERRELL: I object to the question as immaterial.

The COURT: Objection overruled.

Mr. TERRELL: Exception.

A. Yes, I am acquainted with some.

Q. Some member took you to this stand where the members go?

A. In company of the members of the Jockey Club, I never went in their company, because they permit my entrance there. I have seen that sometimes they object to the entrance of other persons there, but to me they never have said anything.

68 Q. You have always conducted yourself there in a gentlemanly manner?

A. Of course.

Q. You never have broken any gate there?

Mr. TERRELL: I object to the question.

The COURT: Objection overruled.

Mr. TERRELL: Exception.

Testimony of Mr. L. Nelson.

Swears in legal form and says his name is L. Nelson, that he lives at the Hotel Metropole and is a singer.

By Mr. TERRELL:

Q. Were you at the San Lazaro Race Track Sunday of this year?

A. Yes, sir; I was at the races.

Q. The day that you were there you saw Flemister on the stand?
A. Yes, sir.
Q. Do you recall having witnessed some altercation or that there was some conversation between the accused Flemister and a policeman while you were there?
A. Yes, sir.
Q. Will you state as briefly as possible whether on that
69 occasion you saw Flemister talk there with that policeman?
A. When I saw Flemister it must have been ten yards from the stairway leading to the stand. He was talking loud enough to enable him to be heard from the place where I was. I believe there were two or more Filipino policemen there. Mr. Flemister talked sometimes courteously and at other times quite loudly.
Q. What was Mr. Flemister doing?
A. He was merely talking with the policeman. The policeman was also talking and wanted him to leave the stand.
Q. Was Mr. Flemister seated or standing there?
A. He was standing.
Q. After that did you see Captain Crame and Mr. Cooley approach to talk with him?
A. I do not know who Captain Crame may have been but I saw Mr. Cooley.
Q. At the moment that you saw Mr. Flemister, and when Captain Crame arrived, did the latter not sit down in the stand?
A. Yes, sir.
Q. When he was already seated, in what position was the policeman with respect to Flemister?
A. One of them, an official, was on one side, and the others were on the other side.
Q. With the exception of the official, these policemen were standing along the same file of chairs, or were they standing along the file behind?
70 A. Along the same line of chairs.
Q. At the moment when Flemister was seated there, and up to the moment when Captain Crame and Cooley came, the accused tried to strike or did strike some person there?
A. No, sir.
Q. Did you see Flemister leave the stand after that?
A. No, because I myself left the stand.

By the PROSECUTION:

Q. What was it that attracted your attention at the San Lazaro Race Track?
A. The loud conversation.
Q. Who was talking loud?
A. Flemister and the policeman.
Q. From the top of the stair to the place where Flemister was seated, some policeman tried to seize him or follow him?
A. I cannot say, but I believe that when they got near me I saw him follow Flemister and grasped him by the arm.
Q. What did Flemister do then?

A. He simply shook his arm.

Q. Did you notice a corporal of police—a Filipino of dark complexion, and cross-eyed?

A. I did not see him; I did not notice him.

Q. There were many people gathered about the place where this occurrence took place?

A. I do not believe that there were; only those who were
71 there when the races commenced.

Q. On that occasion your attention was attracted to the people who were there present?

A. I seemed to be more interested in the races, but I did observe the matter a little.

Q. To what altercation do you refer when you said that you do not recall the date of the altercation—to what altercation do you refer?

A. To some that were there, and I heard Flemister talk with the police.

Q. What language did Flemister use?

A. I did not hear anything that was obscene.

Q. What did he say?

A. The only word that I heard him say is that nobody could arrest him without an order of arrest.

Q. Did you not hear him say some word that no son of a bitch googoo could arrest him?

A. No, sir.

Q. You heard the conversation he had with Captain Crame and Cooley?

A. I could not hear what Cooley said, but I heard Flemister say that he had as much right as the others on that stand.

By Mr. TERRELL:

Q. Are you a member of the Manila Jockey Club?

A. No, sir.

72 Q. Did you enter the stand on your own initiative or were you introduced by one of the members of the Jockey Club?

A. No, sir. I have attended there for five months and have always directly entered the stand.

Testimony of Mr. John M. Flemister.

Swears in legal form and says that his name is John M. Flemister and that he is the proprietor of a livery stable.

By Mr. TERRELL:

Q. Were you at the San Lazaro Track October second of this year?

A. Yes, sir.

Q. Tell all you can that you did at the race track on that date?

A. I went to the San Lazaro Race Track on that day at about two o'clock in the afternoon. I believe that the races began at three or three-fifteen, and I was walking about there until the first race

should commence. Some minutes before the first race I ascended to the stand to see the races. This I did until the third or fourth race.

Then when one of the races was about to commence, I ap-
73 proached the gate through which I had previously entered and placed my hand on the rail of the gate. Supposing that the Filipino who was there had opened and unlatched the gate, I shook it and instead of opening on the side where the chairs were, it opened on the other side. After that I went up the stairs and then went toward the left and took up a position near the entrance. At a distance of forty feet I sat down in a chair. Three policemen followed me and said something that I did not understand, and I told them that they went beyond their duty and they should be silent. Meanwhile Cooley ascended with Captain Crame. I did not know that he was Captain Crame because he was not dressed in uniform. Cooley asked me what the policemen wanted. I replied to Cooley that I did not know, but that I supposed that he wanted to arrest me, and I said that I had not done anything for which he could arrest me, and that I had no intention of being arrested and taken to Tondo by any one. I said to Cooley that if I had been guilty of a breach of any kind, it was his duty to arrest me and that I was ready at any moment to allow myself to be arrested, but that I did not believe that I had done anything. After that they wished that we should go to the place where the porter was to find out where the division was, and after that I again went to the place to return to the stand as I had previously done.

Q. Before you opened this gate and had the dispute, had you used violence on that gate or in any manner broken it?

A. No, sir. On other occasions I entered there, and I
74 opened the gate to pass through.

Q. Immediately after you opened the gate and entered, and started upward toward the stand, did you or did you not strike the policeman or the Filipino porter?

A. I did not strike anybody in that place; I wish to say give a blow to any one. I would like to explain to the Court that I entered that place on numerous occasions and entered the stand two or three times or more during the last two years, and I never had any trouble with anybody, and no policeman ever molested me with respect to the matter.

Q. After you broke the gate, did you send any official or any employee of the Jockey Club money to pay for the damage caused?

A. After the races were ended I descended from the stand and went toward the place where the gate was. I passed this very close to where the gate had been broken. In passing there I saw Señor Lopez looking at the gate, and approached him telling him that it was I who had broken the gate, but that I was ready to pay the damage caused and then this gentleman told me that it did not matter.

Q. During all that time did you have the intention of assaulting any public official in that place?

A. No, absolutely none. I have never antagonized public officials in the service of the Government, and during more than two years

I have never had an altercation, and have always borne a good reputation with them, but for some cause or another Mr. Gale wishes to trouble me always and Mr. Gale tries to place me in a bad
75 situation. I do not know why this is so, but it is because he has an unexplainable antipathy for me.

Q. Is there anything else you want to say?

A. That is all.

By the PROSECUTION:

Q. Are you personally acquainted with Mr. Gale?

A. No, I never asked for an introduction.

Q. Has Mr. Gale asked for an introduction to you?

A. I believe that I have not spoken to Mr. Gale since he was in the Quartermaster's Department of the Constabulary.

Q. At that time was there or not some antagonism shown you by Mr. Gale?

A. No, but since then there has been plenty.

Q. Do you know the occasion when this feeling of antagonism started?

A. I do not know what prejudiced him against me.

Q. This feeling of antagonism arose because Mr. Gale prosecuted you for some criminal offense?

A. No, sir.

Q. He has prosecuted you several times?

A. I believe so; that is what I mean.

Q. Do you know whether, during the time that he has been Assistant Prosecuting Attorney, he has heard of more than thirty charges against you?

A. I know absolutely nothing of what goes on in the office of the Prosecuting Attorney.

76 Q. Turning to the question of this case, how many times did you say you passed through that gate before you broke it?

A. Three times, I think; I cannot say exactly; I think it was at the fourth race.

Q. When you put your hand on the gate and softly shook it tearing off the hinge, where was the porter located?

A. I believe that he was inside the gate.

Q. And when the gate fell, the porter followed with it?

A. No, sir.

Q. The porter said something to you on that occasion with respect to that gate?

A. I believe that he said something.

Q. What did he say to you?

A. I do not remember what he said.

Q. When he spoke to you was when you softly took hold of the gate and broke the hinge?

A. Afterwards.

Q. How long afterwards?

A. Some two seconds.

Q. He placed himself in front of you to stop you?

A. He was standing and leaning, as I have already said.
Q. Did he make some effort to prevent your progress upward?
A. No, sir.
Q. If you did not understand what he said, how is it that you answered "Como no puedo?"
77 A. I employed the Spanish phrase which I am not familiar with, but sometimes I understand.
Q. And you answered comprehending what your reply meant?
A. I understood that he said I could not ascend the stairs.
Q. You understood that he was the gate-keeper?
A. I did not notice because I ascended many times. That is why I answered "Como no puedo?"
Q. Did you see the policeman Celemin at that moment?
A. I do not know if he is a policeman.
Q. You saw a policeman there?
A. No, sir.
Q. After you had ascended the stairs it was that you saw the policeman? When you were still on the steps of the stairs you did not see him?
A. I did not see him. It was after that I passed that I saw him.
Q. Up to that moment you did not see any policeman?
A. Yes, I saw several of them below.
Q. From the moment when you opened the gate up to your arrival above, you did not see any policeman, nor did you know that any policeman was near you?

Mr. TERRELL: I object to the question because the witness has not testified as to that, and it is improper cross-examination.
The COURT: Objection overruled.
Mr. TERRELL: Exception.

78 A. No, sir.

The COURT: The trial is suspended until three o'clock in the afternoon.

DECEMBER 6, 1904.

AFTERNOON SESSION.

The COURT: Let the trial be resumed.

Continuation of the Testimony of Mr. John M. Flemister.

By the PROSECUTION:

Q. When did you first know that the policeman was following you and wanted to arrest you?
A. When I seated myself and saw the policeman toward the stairway.
Q. Was the policeman that followed you about to ascend or one who was still in the gallery?
A. A policeman who was ascending the stairs, and I did not know that he was following me.
Q. Did he say anything to you?

A. After I had seated myself.

79 Q. You did not speak together after sitting down?

A. I do not remember that anything was said.

Q. You did not say anything to him or he to you?

A. I do not remember.

Q. Can you say whether he said anything before you sat down?

A I do not know whether he said anything or not.

Q. Did you say anything to him or not?

A. I do not know whether before I sat down or not, when I was seated.

Q. After the moment when you were away from the stairs he did not grasp you by the sleeve?

A. I do not know because there were many persons there who were watching the races, and I had to pass near other persons to get by.

Q. Then in going by that place you were not talking with the policeman, or disputing there—that is he left your side?

A. In going through the passage perhaps I may have had to say that he should leave me.

Q. Then these gentlemen mistake in saying that you talked in a loud voice?

A. I was talking after arriving at the place where I sat down.

Q. Did you talk with the policeman after arriving at the platform of the stairs and up to your arrival at the place where you sat down?

A. There might have been something said in some part

80 of that place.

Q. But what did you say?

A. I do not remember.

Q. Do you not remember that you said to the policeman "Son of a bitch googoo?"

A. I remember very well that I did not say that.

Q. If you do not remember that you did not say that, how do you remember that you did not say any other words?

A. Because I did not use that word with him. I had no occasion for it.

Q. What was your condition that day with respect to your mind as a result of the liquor?

A. I drank three times that day.

Q. What did the policemen say to you when they went to your seat?

A. I do not remember the words they said to me.

Q. Did you understand what they said to you?

A. I understood that they wanted to take me to Tondo.

Q. They wanted to arrest you?

A. Yes, sir.

Q. And you were arrested?

A. I was not arrested, but I protested.

Q. How did you protest—with your voice or with your fists?

A. I told them that I had not done anything for which they could arrest me, and that I had not done anything for which they

should molest me. Afterwards Mr. Cooley came up and I told him what had occurred.

81 Q. What did you say to Mr. Cooley?

A. I told him what had occurred and I asked him if any warrant had been issued for my arrest.

Q. What did you tell him had occurred?

A. I told him that I had gone to the stand where I had always gone—where I had gone several times previously.

Q. You told him what had occurred when you entered the stand?

A. Upon going up there I had nothing to say.

Q. Did Cooley not say to you that he would arrest you? And did you not say to another officer why was he arresting you?

A. Because there was no reason for their arresting me.

Q. Why did you select Cooley instead of allowing yourself to be arrested by the police intended for that purpose?

A. I did not select Cooley or any official. I only said that.

Q. Why did you not say to the policeman the same thing that you said to Cooley?

A. Because I thought he was outside of his official duty.

Q. You understood that his official duty was to arrest you the same as any other policeman?

A. It is the duty of any policeman to arrest a person who is guilty of a breach of the peace.

Q. Why did you not go to them to be arrested instead of going to Cooley?

82 Mr. TERRELL: I object to the question on the ground that the question has already been put several times in the same sense.

The COURT: I cannot consider the question a repetition, it being understood that the policeman has the duty of arresting any person who disturbs the public order. This witness has said he would not be arrested by the policeman, but he said to Cooley that they should take him to him. The objection is overruled.

Mr. TERRELL: Exception.

A. Because I believe that I had committed no offense for which I should be arrested, nor that I had been guilty of a breach of the peace, and I wished that some superior officer who was not a Filipino should intervene in the matter. Captain Crame was there but he did not make his identity known nor did he speak a word to me.

Q. Is it not true, Mr. Flemister, that you said to Mr. Cooley that you would not let yourself be arrested by any "googoo son of a bitch" but that if he wanted to arrest you it would be all right?

A. I think not.

Q. Is it not true that he said that he could not arrest you because you had not been guilty of any offense in his presence?

A. He said to me that there was no offense for which I

83 could be arrested.

Q. Are you sure that that is what he said to you?

A. Yes, sir.

Q. And he did not say to you that he could not arrest you because you had not committed any offense in his presence?

A. He said that he could not arrest me, so I told him that I had not broken the peace and always submitted to the orders of officers, and Mr. Peterson, when he has needed me or has called for me, has never had to say "We are going to arrest you" without my presenting myself.

Q. That is an established custom?

A. The same manner as in the Sampaloc station.

Q. Are you so accustomed to arrest that only when they call you by telephone it is sufficient to cause you to go?

A. I have always responded to all calls, and I have never given cause for forfeiture of bail.

Q. What occurred with respect to the gate when it was detached from its hinges?

A. It fell to one side, and below.

Q. You picked it up?

A. No, sir.

Q. You did not pick it up and put it to one side of the stand?

A. I did not pick it up but *but* pushed it to one side.

Q. It had fallen on the floor?

A. The gate was to the right?

Q. You made a movement and it fell on the stair?

84 A. Yes, sir.

Q. And the gate remained in a bad position?

A. Yes, sir; it was leaning to one side.

Q. Where—on the floor?

A. I did not observe how it fell.

Q. And you observed much care in preserving the property of the Jockey Club?

A. I have had sufficient education to cause me to pay for the damages occasioned at that moment. I believe that I had broken the gate, but afterwards I saw that it had already been broken.

Q. Which of the two hinges did you first break?

A. I did not notice.

By Mr. TERRELL:

Q. Did you break either of the two hinges?

A. No, sir.

Q. Did you assault or strike the policeman Celemin at that time?

A. No, sir.

Q. Did you use with respect to this policeman Celemin any abusive or insulting language?

A. No, sir.

Q. Did you attempt in any manner to intimidate this policeman by means of either actions or words?

A. No, sir.

Q. Some member of the Jockey Club invited you to enter

85 and make use of that stand?

A. Yes, on several occasions.

Q. Is there another place, separated for members of the Jockey Club above the bar?

A. Yes, sir.

Q. Do you mean that before that time you entered with frequency that same stand?

A. Yes, I went in there more than a hundred times.

Q. State whether the Club has not a porter stationed there at the entrance of that enclosure?

A. Yes, sir.

Q. Did you attempt at any time to pass through the entrance of that stand and were you caused to leave that place?

A. No, sir.

Q. Have you had any dispute with the doctor as he has here testified?

A. Yes, sir.

Q. Do you care to say what that dispute was?

A. I had some trouble with one of the boys in my yard. I told him several times to go out into the street; that I did not need them inside and did not want them to talk Tagalog words there, and as they did not obey me, I threw a stone at them and hit him in the head. He left and found a policeman and I had to go to the Sampaloc station. I asked him if he had seen what had occurred, and told him that he should get a warrant of arrest, and he went out into the street and met this doctor. The doctor entered my house
86 in a discomposed manner and asked if the policeman could not enter his house and arrest him. I answered him that he could not arrest him without authority for it. You can't arrest me either, so that you had better get out.

Q. Was a complaint filed against you in that matter?

A. Yes, sir.

Q. And were you convicted?

A. Yes, sir. I paid ten dollars, and at the Race Track on another occasion he saw that I was arguing with a friend and he immediately came up and said "Why are you arguing?" and I told him that it was none of his business, and since then he has never said anything to me.

Q. After you left the stand, how long were you with Cooley?

A. Some minutes. We went to the marker, and previously we were standing there and talking with Cooley, and I saw a goat on top of the bulletin like a statue, and Cooley said it was a dry goat. I said to him that it could not be and he bet ten dollars that the goat was dry and I said I would take him up and we went to the place where the goat was, as peaceful as before, and it appeared that it was a dry goat, and then I fired a small stone and the goat jumped and all this time I was with Cooley.

By the PROSECUTION:

Q. You knew on that afternoon when you were at the race track that that gate to the stand was for members?

87 A. No, on the contrary it has been opened for the public.

Q. However, you say that you entered and that you had been invited by members into that part of the enclosure?

A. I was invited to all parts of that club.
Q. You did not need to be invited to enter the San Lazaro Race track? You had to pay an entrance fee—did you not?
A. No, it was necessary to pay.
Q. Is it free?
A. No, an entrance fee had to be paid.

Mr. TERRELL: Defense rests.
The attorneys asked the Court to be allowed to file written briefs. The court granted each side five days to file its brief.

87*a* UNITED STATES OF AMERICA, *Philippine Islands:*

In the Municipal Court for the City of Manila.

X 2408.

THE CITY OF MANILA, Plaintiff,
vs.
JOHN M. FLEMISTER, Defendant.

Complaint: Violation of Ordinances.

The undersigned accuses John M. Flemister of the misdemeanor of violation of ordinances of the City of Manila, Philippine Islands, committed as follows:
That on or about the 2nd day of October, 1904, in the City of Manila, Philippine Islands, and in a public place in said City wherein various persons were gathered together, and within the hearing and view of such persons, the said John M. Flemister did, then and there, wilfully and unlawfully make and assist in making a disorder, disturbance, and breach of the peace, and did, then and there, assault, beat, and use personal violence upon one Domingo Salvador, without just cause; all contrary to the provisions of section 1 of Ordinance No. 28, enacted by the Municipal Board of the City of Manila March 19, 1902.
(Signed) JOSE DE CRAME.

Subscribed and sworn to before me and in my presence in the City of Manila, Philippine Islands, this 5th day of October, 1904, by said Jose de Crame.
(Signed) H. E. METCALF,
Acting Clerk, Municipal Court, City of Manila.

Identifying signature, H. D. Terrell.

Witnesses.	Addresses.
Captain Jose Crame	Tondo Station.
Patrolman Feliciano Celemin	Tondo Station.
Patrolman Francisco Cruz	" "
Corporal Antonio Acuña	" "
Domingo Salvador	c/o " "
Faustino Villanueva y Vergara	San Lazaro Race Track.
James B. Cooley	Secret Service Bureau.
Lieut. H. C. Leerson, P. C.	Santa Lucia Barracks.

HDG/ccm/10–5–'04.
Guilty—P. 40.
Bond P. 40.
Oct. 11, 9 a. m.
Oct. 12, 9 a. m.
Oct. 14, 9:30.—Stipulated in open Court that Case #2409 be consolidated & heard at same time.

87*b* UNITED STATES OF AMERICA, *Philippine Islands:*

In the Municipal Court for the City of Manila.

X 2409.

THE CITY OF MANILA, Plaintiff,
vs.
JOHN M. FLEMISTER, Defendant.

Complaint: Violation of Ordinances.

The undersigned accuses John M. Flemister of the misdemeanor of violation of ordinances of the City of Manila, Philippine Islands, committed as follows:

That on or about the 2nd day of October, 1904, in the City of Manila, Philippine Islands, in a public place in said city where various persons were gathered together, and within hearing of such persons, the said John M. Flemister did, then and there, wilfully and unlawfully utter slanderous, threatening and abusive language and expressions of and to Captain Jose Crame, of the Manila Police Department, namely, the said John M. Flemister did, then and there, say of and to the said Captain Jose Crame in said public place "You are a god-damned son of a bitch googoo" and various other profane and unseemly expressions; all contrary to the provisions of section 1 of Ordinance No. 28, enacted by the Municipal Board of the City of Manila March 19, 1902.

(Signed) JOSE DE CRAME.

Subscribed and sworn to before me and in my presence in the City of Manila, Philippine Islands, this 5th day of October, 1904, by the said Jose Crame.

(Signed) H. E. METCALF,
Acting Clerk, Municipal Court, City of Manila.

Witnesses.	Addresses.
Captain Jose Crame	Tondo Station.
Patrolman Feliciano Celemin	" "
Francisco Cruz	" "
Corporal Antonio Acuña	" "
Domingo Salvador	c/o " "
Faustino Villanueva y Vergara	San Lazaro Rack Track.
James B. Cooley	Secret Service Bureau.
Lieut. H. C. Leerson, P. C	Santa Lucia Barracks.

HDG/CCM/10–5–04.
Oct. 11, 9 a. m.
Oct. 12, 9 a. m.
Oct. 14, 9:30.—Dismissed.
Bond P. 40.
Identifying signature, H. D. Terrell.

87*c* UNITED STATES OF AMERICA, *Philippine Islands:*

In the Municipal Court, City of Manila, Philippine Islands.

THE CITY OF MANILA, Complainant,
vs.
JOHN M. FLEMISTER, Defendant.

Cases Nos. X 2408 and X 2409 Consolidated.

The defendant is charged in each of the cases at bar with an infraction of the provisions of section 1 of Ordinance 28 of the Municipal Board of the City of Manila. The complaint in case No. X 2408 charges the defendant generally with disorderly conduct and further with the specific act of striking one Domingo Salvador. The complaint in case No. X 2409 charges the defendant with using threatening and abusive language to one José Crame.

By stipulation in open Court the two cases were consolidated for trial. The evidence in support of the two complaints showed that all the acts, which might be considered any part of the offense or offenses charged in the two complaints, took place within the space of a few minutes, as a succession or series of events, closely connected without any mark or well defined interval between.

In the opinion of this court the law of procedure in force in the Philippine Islands does not countenance a multiplication of prosecutions against the same defendant for an offense made up of a series of acts which cannot clearly and with certainty be dissociated from each other so as to be readily recognized as two or more separate and distinct breaches of the law. This principle is particularly applicable where both prosecutions are brought under the same section of the same ordinance, and where the allegations of the second complaint, *i. e.* the one charging abusive language, might legally, consistently and in keeping with the rules of good pleading have been included in the first complaint charging disorderly conduct.

For this reason case No. X 2409 is dismissed. The evidence bearing upon the allegations of case No. X 2409 is taken into consideration in reaching a judgment in case No. X 2408. In the latter, the defendant John M. Flemister is found guilty of disorderly conduct amounting to an infraction of the provisions of section 1 of Ordinance 28 of the Municipal Board of the City of Manila and sentenced to pay a fine of forty pesos (P. 40.00) Philippine currency.

(Signed) FRANK B. INGERSOLL,
Acting Municipal Judge, City of Manila.

That thereafter, and on the 3rd day of February, 1905, said defendant was found guilty by the Honorable Manuel Araullo, said Presiding Judge of Part I of the Court of First Instance of the City of Manila, of the offense of resisting the agents of the authorities, in a judgment in the words and figures following:—

88 UNITED STATES OF AMERICA, *Philippine Islands:*

In the Court of First Instance of the City of Manila.

No. 1826.

THE UNITED STATES
vs.
JOHN FLEMISTER.

Assault Against an Agent of the Authorities.

Judgment.

It was proved at the trial that on the afternoon of the third of October of the year last past, while some horse races were being held at the San Lazaro Race Track belonging to the Jockey Club of this City, the accused John Flemister, who was on the track, entered the enclosure reserved for the members of the society, among which the accused was not numbered, and notwithstanding that he had been warned by Domingo Salvador, who was in charge of the enclosure, that not being a member of the society and the enclosure being reserved exclusively to members, he could not be admitted therein; that notwithstanding this warning, the accused Flemister insisted on climbing into and remaining in the enclosure, occasioning a violent altercation with the said Domingo Salvador, as the result of which, as well as of the violent manner in which he climbed into the place, the gate of the enclosure was broken; that as a result of this disorder, of which the policeman Feliciano Celemin,
89 who was in uniform and was on duty at the track, was informed, the latter intervened in the altercation between Flemister and Salvador, and in view of the obstinacy of the former in persisting in remaining in the enclosure, and of the fact that disorder was caused in the public view, he tried to arrest Flemister and told

him that he was a prisoner; that Flemister forcibly opposed his arrest by the said policeman; that later the Corporal Pablo Acuña and afterwards Captain Crame, who were also at the track on the occasion in question, intervened in the altercation; that the accused Flemister not only disregarded and depreciated the intervention of the policeman Feliciano Celemin, Pablo Acuña and Captain Crame, but continued his opposition to being arrested, resisting this to the point that where, according to said Feliciano Celemin and Corporal Acuña, he struck the first in the stomach and the second in some other part of the body, and cast indecent and insulting epithets at Celemin, saying in the presence of all the people there congregated that he would not permit himself to be arrested by any "son of a bitch googoo," alluding, doubtless, to the policeman Feliciano Celemin as well as to the other Filipino policemen present at the track, and lastly, that in view of the determined resistance of the accused Flemister to being arrested, Captain Crame, in order to avoid greater disorder, greater scandal than that which had been produced by the preceding acts, desisted from his purpose of effecting the arrest of the accused Flemister, which was not accomplished even by
90 the intervention of an American policeman of the Secret Service named Colley. These facts have been classified in the complaint as the crime of an assault upon an agent of the authorities provided for and punished in paragraph 2 of article 249, in connection with paragraph 3 of article 250 of the Penal Code, the defendant Flemister being accused of having resisted on the occasion referred to the policemen then on duty, assaulting the policemen Feliciano Celemin. These facts being duly appreciated, the occasion, the circumstances, and the manner in which they were unrolled being taken into account, they do not, in the judgment of the court, constitute a crime of an assault upon an agent of the authorities defined and punished in said article 249, nor that defined in article 250, nor that referred to in 251 of the said Code. They constitute the crime covered and punished by article 252 of the Code, that is, grave resistance and disobedience to an agent of the authority in the exercise of the duties of his office. It must be taken into consideration that the law punishes as the crime of an assault on the authorities or their agents covered by the three articles first mentioned, the act of seriously resisting the authorities or their agents, assaulting them, employing force against them, or making some serious resistance. In the present case, taking into consideration the circumstances surrounding the accused Flemister and the policemen Feliciano Celemin, Pablo Acuña, the altercation which preceded the statement by the policeman Celemin that the accused Flemister was under arrest, that Flemister opposed his apprehension by the
91 policeman Celemin, and notwithstanding the opposition of the porter Salvador, climbed into the enclosure, sat down in one of the seats therein, and maintained an attitude, although in a certain degree passive, was sufficiently violent. It cannot be said that the accused Flemister assaulted or gravely intimidated the policemen, nor that he seriously resisted them. It is clearly understood

that an altercation between Domingo Salvador and the accused Flemister took place; that the policeman Celemin intervened a few moments afterward; that later Corporal Acuña and lastly Captain Crame appeared on the scene; that the accused Flemister, while Celemin was in front of him, and he was opposing his arrest, made some movement to rid himself of the presence of the policeman. This movement, although more or less violent, cannot be considered from a legal point of view to have the character of an assault upon an agent of the authorities. It should rather be deemed an accidental circumstance of the disobedience of Flemister to the policeman Celemin, and a resistance to his arrest by the policeman. The Supreme Court of Spain, in the judgments of the 25th of April, 1877, and the 28th of December, 1885, has laid down this doctrine in cases identical to the one at bar. The aggression, if such may be called the movement made by the accused Flemister, in striking the body of the policemen Celemin and Corporal Acuña, has not the character of such an assault. It was a material manner of showing his resistance and disobedience to the policeman. For this reason the act must be qualified as grave resistance and disobedience. If
92 the accused Flemister had not made the policeman the object of his insulting epithets on that occasion and under those circumstances, but had confined himself to maintaining an aggressive attitude to the point of striking the policeman, if the act had been limited solely to disobedience, Flemister maintaining passive attitude toward the policemen Celemin, Captain Crame and Corporal Acuña, then that disobedience could not be classified as grave. It would be merely a slight disobedience, and would be punished as a breach of the peace. But in the present case it is evident that the disobedience of the accused Flemister to the policemen was serious. It was accompanied by circumstances that show its gravity, and bring the act within article 252, although not within articles 250 and 251 of the Penal Code, and must be classified as serious resistance and disobedience to an agent of the authority. The simple act of disobeying and resisting an agent of the authority, and putting violent hands upon him, cannot be classified as an assault under articles 250 and 251. Although these articles classify as a determining circumstance of the crime of assault the putting of the hands upon the authorities or their agents in connection with resistance or disobedience, the act of "putting the hands," the phrase employed in these articles, must be understood in the sense of assault, an aggression in connection with the serious intimidation. It is indubitable that these circumstances did not occur in the present case. For this reason, even conceding that the accused struck the policemen
93 Celemin and Acuña, this would not be classified as an assault upon the agents of the authorities. In this case it has been proved that the accused struck the two policemen. The testimony of the latter and of others at the trial prove it conclusively. If it is true that some of the witnesses for the defense said that he did not see the accused fighting or assaulting the policeman Celemin, or any other policeman, these might have arrived at the scene of the

occurrence some moments after the blow was given the policeman Celemin. It is to be taken into account that Captain Crame testified that the accused did not strike any one in his presence, but Captain Crame arrived after the policeman Celemin told the accused that he was under arrest, and after, doubtless, the accused Flemister had struck the body of Celemin. It is necessary, therefore, to take into consideration these two circumstances—that of the accused having struck the policeman Celemin, and that of having made him the object of insulting and calumnious names when he said that he would not permit himself to be arrested by the policeman, qualifying it with a depreciative epithet. The act, therefore, constitutes serious resistance and disobedience to an agent of the authorities.

In the present case the allegation by the defense that the accused had already been tried by this Court for the same offense, in other words the plea of jeopardy, can not be deemed well founded. Granting that the Municipal Court consolidated two cases against the same defendant with the numbers 2408 and 2409, these two cases do not refer to the very same criminal offense prosecuted herein. In
94 one of them Flemister was accused of having started a disturbance or breach of the peace, and assaulted and struck one Domingo Salvador, a porter at the San Lazaro Race Track. In the other he was accused of having made Captain Crame the object of insulting words in the same place. In this Court another case against the accused for a breach of the peace was consolidated with this under the number 1229. In the complaint filed in the latter case the act of having resisted and disobeyed or assaulted the policeman Feliciano Celemin on the occasion in question, an act which is the specific subject of the sentence in the present case, was not included. The accused is therefore guilty of the crime covered and punished by the said article 252 of the Penal Code.

In the commission of the crime, the aggravating circumstance of two prior convictions of a crime for which the law assigns a lighter penalty must be considered, it appearing that the defendant was twice convicted in the Municipal Court of the City of Manila. This circumstance being taken into consideration, and there being no mitigating circumstance to offset it, the accused should be condemned to the corresponding penalty in its maximum grade.

I sentence the accused John M. Flemister to the penalty of four months and ten days of *arresto mayor*, with the accessories of article 61, to a fine of two thousand pesetas, and in case of insolvency, to suffer corresponding subsidiary imprisonment, not to exceed
95 a third part of the principal penalty, and to the payment of the costs. So ordered.

Manila, February 3, 1905.

(Signed) MANUEL ARAULLO, *Judge*.

That thereafter, to wit, on the 9th day of February, 1905, the defendant gave due notice of appeal from said judgment.

That thereafter, and on the 17th day of April, 1905, said cause was duly remitted by the Clerk of said Court of First Instance of Manila to the Supreme Court of the Philippine Islands, and was on

said day duly filed and enterd as a pending cause in said Supreme Court of the Philipine Islands.

That thereupon and thereafter, in the said Supreme Court of the Philippine Islands, the said United States, plaintiff and appellee, was represented by the Honorable Gregorio Araneta, Solicitor-General of the Philippine Islands, and the said defendant was represented in the said Court by Mr. Howard D. Terrell, as his attorney, and after due proceedings had and presentation of printed briefs, and oral argument of counsel in the said cause, said cause was on the 28th day of November, 1905, finally heard by said Supreme Court of the Philippine Islands, and thereafter, on the 26th day of February, 1906, the following decision was rendered by the said Supreme Court in the said cause:

96 UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

No. 2618.

UNITED STATES
vs.
JOHN M. FLEMISTER.

JOHNSON, *J.*:

This defendant was charged with the crime of a criminal attempt against the agent of the authorities as follows:

"That on or about the second day of October, 1904, in the City of Manila, Philippine Islands, the said John M. Flemister did, then and there, wilfully, unlawfully and feloniously, attack an agent of the public authorities, to wit: Feliciano Celimin, a duly appointed, qualified and acting police officer of the City of Manila, and did, then and there, employ force against, gravely intimidate, and offer grave resistance to the said Feliciano Celimin, while he was discharging the functions of his office and on the occasion thereof, and did, then and there, lay hands upon the said Feliciano Celimin while he was discharging the duties of his office, in this, that on the said 2nd day of October, 1904, the said Feliciano Celimin, among other police officers of the City of Manila, was detailed and designated by the authorities to preserve the peace at San Lazaro Race Track of the City of Manila, and that, then and there, the said John M. Flemister did commit, in the presence and view of the said Celimin an assault and breach of the peace, and that the said Celimin, then and there, attempted to place the said Flemister under arrest for such offense; and that the said Flemister thereupon resisted such arrest and attacked and struck the said Feliciano Celimin and used vile, insulting, profane and obscene language to the said Feliciano Celimin; by reason of which attack, force, intimidation and resistance towards the said Feliciano Celimin, the authorities of the City of Manila were compelled to yield to the exactions of the said Flemister and refrain from the arrest of said Flemister; that the said

offense was accompanied by the following aggravating circumstances:

97 "That the said John M. Flemister has been previously punished for two or more crimes for which the law fixes a lighter penalty than that prescribed by law for the offense charged herein."

"(Signed) JOSE DE CRAME."

The complaint was duly sworn to.

The complaint was presented on the 5th day of October, 1904, and the defnedant was arrested upon the same day. On the 20th day of October, 1904, the defendant was duly arraigned and after hearing read the foregoing complaint pleaded "Not guilty" of the crime of which he was accused in the said complaint and alleged also that he had already been dismissed in a competent court for the same crime.

The inferior court found that the defendant had been accused of a violation of section 1 of ordinance 28 of the City of Manila and had been tried by the municipal court of said City and that the offenses with which the defendant had been charged in said municipal court did not include the one with which he was charged in the complaint in this cause. The complaints presented against this defendant in the municipal court were as follows:

1st. "The undersigned accuses John M. Flemister of the misdemeanor of violation of ordinances of the City of Manila, Philippine Islands, committed as follows:

"That on or about the 2nd day of October, 1904, in the City of Manila, Philippine Islands, and in a public place in said city wherein various persons were gathered together, and within the hearing and view of such persons, the said John M. Flemister did, then and there, wilfully and unlawfully, make and assist in making a disorder, disturbance, and breach of the peace, and did, then and there, assault, beat and use personal violence upon one Domingo Salvador, without just cause; all contrary to the provisions of section 1 of ordinance No. 28, enacted by the Municipal Board of the City of Manila, March 19, 1902.

(Signed) "JOSE CRAME."

98 The complaint was duly sworn to.

2nd. "The undersigned accuses John M. Flemister of the misdemeanor of violation of ordinances of the City of Manila, Philippine Islands, committed as follows:

"That on or about the 2nd day of October, 1904, in the City of Manila, Philippine Islands, in a public place in said City where various persons were gathered together, and within hearing of such persons, the said John M. Flemister did, then and there, wilfully and unlawfully, utter slanderous, threatening and abusive language and expressions of and to Captain Jose Crame, of the Municipal Police Department, namely the said John M. Flemister did, then and there, say of and to the said Captain Jose Crame in said public place 'You are God damned son-of-a-bitch gugú' and various other

profane and unseemly expressions; all contrary to the provisions of section 1 of Ordinance No. 28, enacted by the Municipal Board of the City of Manila, March 19, 1902."

(Signed) "JOSE CRAME."

The complaint was duly sworn to.

By stipulation in open court, these two complaints were consolidated for trial. After hearing the evidence in said cause, the judge of the Municipal Court dismissed the second complaint and taking into consideration the evidence introduced to support the second complaint, as well as the evidence in first complaint, found the defendant guilty of the facts charged in the first complaint, and sentenced him to pay a fine of forty pesos, Philippine Currency.

From an examination of the offenses charged in the three complaints, the two in the municipal court and the one in the Court of First Instance, for which the defendant was tried, it will be seen that the complaint which was filed in the Court of First Instance of the City of Manila charged the defendant with a "criminal at-
99 tempt against one, Feliciano Celimin, a policeman of the City of Manila and an agent of the authorities," while the complaint in the first case in the municipal court charged the defendant generally with "disorde-ly conduct and with striking one, Domingo Salvador." The second complaint filed in the municipal court charged the defendant with using "threatening and abusive language to one, Jose Crame." These offenses are separate and distinct. Therefore the inferior court was justified in denying the plea presented by the defendant of *"autrefois a-quit."*

Even though it should be admitted that the defendant had been proceeded against in the municipal court for a crime resulting from the same acts with which he was charged in the Court of First Instance, yet nevertheless he would not be entitled to be acquitted under his plea of *autrefois a-quit"* for the reason that the acts with which he was charged in the municipal court constituted a violation of section 1 of Ordinance No. 28 of the City of Manila, and the acts with which he was charged in the complaint in the Court of First Instance constituted an offense punishable under the Penal Code, and were distinct offenses.

This Court has recently decided in the case of United States *vs.* Chan-Cun-Chay (4 Official Gazette page 42) that "Where the same acts constitute an offense against each of two sovereignties exercising jurisdiction over the same territory, a prosecution brought by one does not necessarily bar a prosecution by the other."

It is not necessary to invoke this doctrine here in this case
100 for the reason that the offences with which the defendant had been charged in the said municipal court did not include the offense for which he was tried in the Court of First Instance.

An examination of section 1 of Ordinance No. 28 of the City of Manila, in comparison with articles 249 and 250 of the Penal Code will also show that the two laws punish different offenses. Section 1 of Ordinance No. 28 provides:

"No person shall make, aid, countenance, or assist in making any

riot, affray, disorder, disturbance, or breach of the peace; or assault, beat, or use personal violence upon another without just cause in any public place; or utter any slanderous, threatening, or abusive language, or expression; or exhibit or display any emblem, transparency, representation, motto, language, device, instrument, or thing; or do any act, in any public place, meeting, or procession, tending to disturb the peace or excite a riot; or collect with other persons in a body or crowd for unlawful purpose; or disturb or disquiet any congregation engaged in any *un*lawful assembly."

Paragraph 2 of Article 249 of the Penal Code provides that the following persons are guilty of a criminal attempt:

"Those who attack the authorities or their agents, or employ force against them, or gravely intimidate them, or offer an equally grave resistance while they are discharging the functions of their office or on the occasion thereof."

Article 250 provides:—

"The criminal attempts included in the preceding article shall be punished with the penalties of prision correccional in its medium degree to prision mayor in its minimum degree, and a fine of from 625 to 6,250 pesetas, provided that any of the following circumstances are attendant:

1. If the aggression were accomplished by weapons;
2. If those guilty thereof were public officials;
3. If the delinquents laid hands upon the authorities;
4. If in consequence of compulsion the authorities should have yielded to the exactions of the delinquents.
5. Without these circumstances the penalty should be prision correccional in its minimum to its medium degree and a fine of from 375 to 3,750 pesetas."

After hearing the evidence the inferior court found the defendant guilty of the crime provided for and punished under Article 252 of the Penal Code and taking into consideration the fact that the defendant had been condemned twice for an offense for which the law imposes a less penalty, as an aggravating circumstance, sentenced the defendant to be imprisoned for a period of four months and ten days of arresto mayor, with the accessories of the law provided for in Article 61 of the Penal Code, to pay a fine of 2,000 pesetas, to suffer in case of insolvency imprisonment, which should not exceed one-third part of the principal penalty, and to pay the costs. From this decision the defendant appealed to this Court.

From an examination of the evidence adduced during the trial of said cause in the court below, we adduce the following facts:

That on the 2nd day of October, 1904, while attending the races at San Lazaro Race Track in the City of Manila, the defendant attempted to pass through a gateway leading to a portion of the grand stand of said race track which was and had been for some time prior thereto reserved exclusively for members of the association in charge of said race track, which association was known as the Manila
102 Jockey Club; that one, Domingo Salvador, was an attendant at said gate in the employment of said association and was instructed to allow no one to pass through the said gate except mem-

bers of the association; that the defendant attempted to pass through the said gate and was informed that he could not pass through because he was not a member of said association; that thereupon the said defendant, by means of force, broke open the said gate and passed through into that portion of the grand stand reserved for members; that this action on the part of the defendant was reported to a policeman called Feliciano Celemin, who was stationed by the proper authorities near the said gate to assist in the maintenance of order; that the defendant, in passing through the gate, threw the attendant, Salvador to the ground, while he, the said attendant, was attempting to prevent the defendant from passing through the said gate; that when the said policeman, Celimin, saw this conduct on the part of the defendant, he approached the defendant and attempted to place him under arrest, whereupon the defendant struck the said policeman in the stomach; that during this proceeding the defendant used vile, abusive and threatening language towards the said Celimin, as well as to the other policemen who had assembled there in the meantime.

From these facts we are of the opinion that the defendant is guilty of a violation of the provisions of paragraph 2 of article 249 of the Penal Code and must be punished under paragraph 5 of article 250 of the same Code.

Under this conclusion of fact it becomes necessary, under
103 the provisions of the Penal Code applicable to the same, to impose a severer penalty than that imposed by the lower court. The question now arises has this court the right, when a defendant appeals from the decision of an inferior court, to modify or revoke the sentence of such inferior court and increase the penalty. This court has already decided in numerous cases that it has that authority.

See United States *vs.* Trono, 2 Official Gazette, 296;
United States *vs.* Flemister, 3 Official Gazette, 386.

In the case of United States *vs.* Flemister, this Court said:

"The Court has the power, whenever a final judgment in any criminal case shall be reversed upon appeal by the defendant on account of errors committed by the inferior court in imposing the penalty under the law, to render such judgment in said cause as should have been rendered by the inferior court."

In the case of United States *vs.* Trono the defendant appealed to the Supreme Court of the United States, upon the theory that this court had no authority to increase the penalty imposed by the inferior court, for the reason that thus the defendant had been put in jeopardy twice for the same offense.

The Supreme Court, in its decision of the 4th of December, 1905, sustained the decision of this court. In deciding the case,
104 Mr. Justice Peckam, who wrote the majority opinion, said among other things:

"When at his own request he (the defendant) has obtained a new trial, he must take the burden with the benefit and stand for a new trial of the whole case. It does not appear to us to be a practice

founded on solid reason to permit such a limited waiver (of jeopardy) by the accused party, while he himself is asking for a reversal of the judgment."

* * * * * * *

"A further question is made as to the power of the Supreme Court of the (Philippine) Islands to reverse the judgment appealed from and itself convict the accused on appeal. The Supreme Court (of the Philippine Islands) in so doing, acted within its power and jurisdiction. It is a result of the ordinary procedure in the courts of that country (the Philippine Islands), proceeding under the Act of Congress."

The judgment of the inferior court is therefore hereby revoked and the defendant is hereby sentenced to be imprisoned for a period of two years and six months of prisión correccional, to suffer the accessory penalties provided for in Article 61 of the Penal Code, to pay a fine of 3,750 pesetas and in case of insolvency to suffer subsidiary imprisonment for a period not to exceed one-third of the principal penalty, and to pay the costs.

It is so ordered.

105 That thereafter, and on the 7th day of March, 1906, the Honorable L. M. Southworth, attorney for the defendant, moved for a rehearing of the said cause, which, on the 14th of March following, the said Supreme Court denied.

That thereafter, and on the 21st of March, 1906, final judgment was duly entered in the said cause.

That thereafter, and on the 24th of March, 1906, the Honorable L. M. Southworth, attorney for the defendant duly excepted to the said order of the said Supreme Court of the 14th of March preceding denying the defendant's motion for a rehearing.

That thereafter, and on the 28th of March, 1906, the Honorable L. M. Southworth, attorney for the defendant, duly excepted to the final judgment of the said Supreme Court in the said cause.

That thereafter, and on the 28th day of March, 1906, the said defendant, by said Honorable L. M. Southworth, his counsel, presented a petition in error to the Honorable, the Supreme Court of the United States, in the said cause, together with his assignment of error, as follows, to-wit:

UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

UNITED STATES, Plaintiff and Appellee,
vs.
JOHN M. FLEMISTER, Defendant and Appellant.

106 *Petition for Writ of Error.*

The defendant and appellant feeling himself aggrieved by the decision of the Court made on February 26, 1906, and the judgment

entered thereon on the 21st of March, 1906, comes now by L. M. Southworth his Attorney and petitions the Court for an order allowing the defendant and appellant herein to prosecute a Writ of Error in the Supreme Court of the United States under and according to the laws of the United States in that behalf made and provided; and that an order be made fixing the amount of security which defendant shall give pending said Writ of Error; and that upon the giving of said security, all further proceedings in this Court be suspended and stayed until the determination of said Writ of Error by said Supreme Court of the United States.

(Signed) L. M. SOUTHWORTH,
Attorney for Defendant and Appellant,
Escolta, 34, Manila, P. I.

Filed in the Clerk's Office of the Supreme Court of the Philippine Islands this 28th day of March, 1906, at 3 p. m.

J. E. BLANCO, *Clerk.*

UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

UNITED STATES, Plaintiff and Appellee,
vs.
JOHN M. FLEMISTER, Defendant and Appellant.

107 *Assignment of Errors.*

Comes now the above named defendant and appellant by his attorney, L. M. Southworth, and presents the following assignment of errors, which he avers occurred upon the hearing of said case and upon which he will rely in the prosecution of his Writ of Error in the above-entitled case.

First. This court erred in determining that it had jurisdiction to increase the sentence of the Court of First Instance in this cause, from which an appeal was taken by the accused to this Court.

Second. The Supreme Court of the Philippine Islands has no original jurisdiction in criminal cases and the decision of the Court in this case in effect converts the Supreme Court of the Philippine Islands into a court of original jurisdiction and deprives the accused of the right to be confronted by the witnesses against him before the tribunal which considers and determines the facts.

Third. The decision of the Court which deprives the accused of his liberty without due process of law, which right is guaranteed by section 5 of the Act of Congress approved July 1, 1902, known as the "Philippine Bill."

Fourth. The decision of the Court places the accused in jeopardy for the same offense according to the corresponding provisions of section 5 of the Act of Congress of July 1, 1902.

Wherefore, the said defendant and appellant (Plaintiff in Error)

prays that the judgment of the Spureme Court of the Philip-
108 pine Islands be reversed and said cause against him be dismissed, and that he go hence without day.

(Signed) L. M. SOUTHWORTH,
Attorney for Plaintiff in Error,
Escolta, 34, *Manila, P. I.*

Filed in the Clerk's Office of the Supreme Court of the Philippine Islands this 28th day of March, 1906, at 3 p. m.

(Signed) BLANCO, *Clerk.*

That thereafter and on the 30th day of March, 1906, a Writ of Error was duly granted by the Honorable E. Finley Johnson, one of the Associate Justices of the Supreme Court of the Philippine Islands, in said cause, as follows:

UNITED STATES OF AMERICA:

In the Supreme Court of the United States of America.

JOHN M. FLEMISTER, Plaintiff in Error,
vs.
THE UNITED STATES, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *Philippine Islands, ss:*

The President of the United States of America to Judges of the Supreme Court of the Philippine Islands, Greeting:

109 Because in the record and proceedings and also in the rendition of the judgment in the said Supreme Court of the Philippine Islands, before you or some of you, between the United States of America, plaintiff and appellee, against John M. Flemister, defendant and appellant, a manifest error hath happened, to the great damage of said John M. Flemister, as he said and appears in his petition for a Writ of Error, we, being willing that such error, if any hath happened, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, that judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this Writ, so that you may have the same at Washington on the 27th day of July next, in said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being duly inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States ought to be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the United

States, this 30th day of March, in the year of A. D. 1906, and of the Independence of the United States the 131st.

[Seal of the Supreme Court of the Philippine Islands.]

(Signed) J. E. BLANCO,
Clerk of the Supreme Court of the Philippine Islands.

110 The foregoing Writ is allowed and upon the filing in the office of the Clerk of this Court by said plaintiff in error of a bond in the sum of twenty-five hundred pesos, conant, approved by me, it is Ordered that said Writ of Error shall operate as a super*sidious* and stay of execution.

Dated, Manila, P. I., March 30th, 1906.

(Signed) E. FINLEY JOHNSON,
Associate Justice of the Supreme Court of the Philippine Islands.

[Seal of the Supreme Court of the Philippine Islands.]

That on the thirtieth day of March, 1906, a super*sidious* bond was filed by the said defendant in the said cause, as follows, to-wit:

UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

No. —.

UNITED STATES, Plaintiff and Appellee,
vs.
JOHN M. FLEMISTER, Defendant and Appellant.

Whereas John M. Flemister, the Defendant in the above-entitled action has taken a Writ of Error to the Supreme Court of the United States of America, for a review of the judgment rendered by the Supreme Court of the Philippine Islands, condemning the said defendant to two years and six months of *prisión correccional*, and to pay a fine of 3500 pesetas,

111 Now, therefore, in consideration of the premises , id of the granting by the Supreme Court of the Philippine Islands of a writ of error to the Supreme Court of the United States of America in favor of the said Defendant, John M. Flemister

We, John M. Flemister, as principal, and Walter E. Olsen and E. M. Bachrach, as sureties do hereby acknowledge ourselves to be held and firmly bound jointly and severally to the United States of America in the sum of Two Thousand Five Hundred Pesos (P.2,500) Philippine Currency, to the payment of any and all costs which may be awarded against said Defendant John M. Flemister not exceeding Two Thousand Five Hundred Pesos (P.2,500) upon the prosecution of said Writ of Error in the Supreme Court of the United States.

In witness whereof, we have set our hands in Manila, P. I., this 30th day of March, 1906.

(Signed) JOHN M. FLEMISTER.
(Signed) WALTER E. OLSEN.
(Signed) E. M. BACHRACH.

CITY OF MANILA, *Philippine Islands, ss:*

Walter E. Olsen and E. M. Bachrach, the sureties who signed the preceding obligation, being first duly sworn upon oath each for himself says that he is a resident and proprietor of the City of Manila, and that he is solvent in the sum mentioned in said obligation with exclusion of all debts and obligations and with exclusion of property subject to execution.

(Signed) WALTER E. OLSEN.
(Signed) E. M. BACHRACH.

112 Subscribed and sworn to before me this 30th day of March, 1906.

J. E. BLANCO,
Clerk of the Supreme Court of the Philippine Islands, Ex-officio Notary Public.

Approved:
E. FINLEY JOHNSON,
Associate Justice, Supreme Court.

[Seal of the Supreme Court of the Philippine Islands.]

That thereupon and on said 30th day of March, 1906, due citation was issued in the cause of John M. Flemister, Plaintiff in Error, against the United States, Defendant in Error, as follows, to wit:

UNITED STATES OF AMERICA:

In the Supreme Court of the United States of America.

UNITED STATES OF AMERICA, *Philippine Islands, ss:*

By the Hon. E. Finley Johnson, Associate Justice of the Supreme Court of the Philippine Islands.—T. L. R. Wilfley Esq., Attorney General of the Philippine Islands, Attorney for the United States of America, and to the United States of America, greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at the Capitol in the City of Washington, in the District of Columbia on the 10th day of
113 July, 1906, pursuant to a Writ of Error filed in the Clerk's Office of the Supreme Court of the Philippine Islands, wherein John M. Flemister is Plaintiff in Error and the United States is Defendant in Error, to show cause, if any there be, why the judgment in said Writ of Error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the City of Manila, in the Supreme Court of the Philippine Islands, above named this 30th of March in the year of Our Lord One thousand Nine Hundred and Six, and the year of Independence of the United States the One Hundred and Thirty-First.

(Signed) E. FINLEY JOHNSON,
Associate Justice of the Supreme Court of the Philippine Islands.

L. M. SOUTHWORTH,
Attorney for Plaintiff in Error.

Notice of citation is hereby acknowledged.

L. R. WILFLEY,
Attorney-General.

[Seal of the Supreme Court of the Philippine Islands.]

Manila, April 7, 1906.

114 In the Supreme Court of the United States.

JOHN M. FLEMISTER, Plaintiff in Error,
vs.
THE UNITED STATES, Defendant in Error.

And now come the said Plaintiff in Error, represented by his counsel, the Honorable Louis M. Southworth, and the said United States, Defendant in Error, represented by the Honorable Lebbeus R. Wilfley, Attorney-General of the Philippine Islands, and hereby stipulate and agree that the foregoing is a true and correct record of all the essential proceedings had and of all the evidence taken in the said above-entitled cause, both in the Court of First Instance of the City of Manila and in the Supreme Court of the Philippine Islands, and that any and all documents heretofore appearing in said original records in the said above mentioned court have been duly and correctly translated into the English language where necessary, and included in this record as a part thereof, and said parties, through their said counsel, further stipulate and agree upon the foregoing record as being a true and correct record in said cause for presentation to the Honorable the Supreme Court of the United States.

LOUIS M. SOUTHWORTH,
Counsel for Plaintiff in Error.
LEBBEUS R. WILFLEY,
Counsel for Defendant in Error.

115 UNITED STATES OF AMERICA, *Philippine Islands:*

I hereby certify that the foregoing record and stipulation consisting of one hundred and fourteen (114) type-written pages, is a true and correct record of the proceedings had in the Court of First Instance of the City of Manila, and the Supreme Court of the Phil-

ippine Islands, in the above-entitled cause, as agreed upon between the parties to said cause, and that the same was compiled by me in conformity with the expressed desire and instructions of the said parties to said cause, acting through their respective counsel.

In witness whereof, I have hereunto set my hand and caused to be affixed the seal of the Supreme Court of the Philippine Islands, this thirty-first day of May, 1906.

H. D. McGEORGE,
Deputy Clerk of the Supreme Court of the Philippine Islands, in Charge.

[Seal Corte Suprema, Islas Filipinas.]

Endorsed on cover: File No. 20,314. Philippine Islands supreme court. Term No. 70. John M. Flemister, plaintiff in error, *vs.* The United States. Filed July 23d, 1906. File No. 20,314.

EXTRACTS FROM TRANSCRIPT OF

SUPREME COURT OF THE UNITED

OCTOBER TERM, 190

No. 70.

JOHN M' FLEMISTER, PLAINTIFF IN

vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINES.

FILED JULY 22, 1908.

(20814.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 349.

JOHN M. FLEMISTER, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

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1 Supreme Court of the United States. term, 190 .

JOHN M. FLEMISTER, PLAINTIFF in error. *vs.* THE UNITED STATES OF AMERICA, defendant in error.	In error to the Supreme Court of the Philippine Islands.

Proceedings had in the Court of First Instance of the city of Manila and the Supreme court of the Philippine Islands.

THE UNITED STATES *vs.* JOHN M. FLEMISTER.

Be it remembered that heretofore, to wit, on the fifth day of October, 1904, in the Court of First Instance of the city of Manila, came José de Crame, and filed in the clerk's office of said court a complaint signed and sworn to by him, against John M. Flemister, which said complaint is in the words and figures following, to wit:

United States of America, Philippine Islands. In the Court of First Instance for the city of Manila.

THE UNITED STATES, PLAINTIFF, *vs.* JOHN M. FLEMISTER, DEFENDANT.	Complaint. Criminal attempt against the agents of the authorities.

2 The undersigned accuses John M. Flemister of the crime of a criminal attempt against the agents of the authorities, committed as follows:

That on or about the 2nd day of October, 1904, in the city of Manila, Philippine Islands, the said John M. Flemister did, then and there, wilfully, unlawfully, and feloniously, attack an agent of the public authorities, to wit, Feliciano Celimin, a duly appointed, qualified, and acting police officer of the city of Manila, and did, then and there, employ force against, gravely intimidate, and offer grave resistance to the said Feliciano Celimin while he was discharging the functions of his office and on the occasion thereof, and did, then and there, lay hands upon the said Feliciano Celimin while he was discharging the duties of his office, in this, that on said 2nd day of October, 1904, the said Feliciano Celimin, among other police officers of the city of Manila, was detailed and designated by the authorities to preserve the peace at the San Lazaro race track of the city of Manila, and that, then and there, the said John M. Flem-

ister did commit, in the presence and view of the said Celimin an assault and breach of the peace, and that the said Celimin, then and there, attempted to place the said Flemister under arrest for such offense; and that the said Flemister thereupon resisted such arrest and attacked and struck the said Feliciano Celimin and used vile, insulting, profane, and obscene language to the said Feliciano Celimin; by reason of which attack, force, intimidation, and resistance toward the said Feliciano Celimin the authorities of the city of Manila were compelled to yield to the exactions of the said Flemister and refrain from the arrest of said Flemister; that the said
3 offense was accompanied by the following aggravating circumstance:

That the said John M. Flemister has been previously punished for two or more crimes for which the law fixes a lighter penalty than that prescribed by law for the offense charged herein.

(Signed) JOSÉ DE CRAME.

Subscribed and sworn to before me and in my presence in the city of Manila, Philippine Islands, this 5th day of October, 1904, by the said José Crame.

(Signed) MANUEL ARAULLO,
Court of First Instance, City of Manila, P. I.

Witnesses:	Addresses:
Capt. Jose Crame	Tondo Sta.
Patrolman Feliciano Celimin	"
" Francisco Cruz	"
Corporal Antonio Acuna	"
Domingo Salvador	c/o "
Faustino Villanueva y Vergara	San Lazaro Race Track.
James B. Cooley	S. S. B.
Lieut. H. C. Leerson, P. C	Sta. Lucia Barracks.

H. C. Metcalf, actg. clk., Municipal Court, to bring with him record of Municipal Court showing convictions of John M. Flemister during the preceding two years.

J. McMicking, clerk Court of First Instance, to bring with him records of convictions of John M. Flemister during the preceding two years.

Bail recommended, four thousand (4,000) pesos.

That after the presentation of said complaint, and on the said fifth day of October, 1904, said defendant was arrested and was thereupon released upon bond.

4 That thereafter and on the seventh day of October, 1904, said defendant was arraigned on the charge of having made a criminal assault upon the agents of the authorities.

That thereafter, and on the 20th day of October, 1904, the said defendant entered the pleas of not guilty and of former jeopardy, which were further set up in a plea filed the 24th day of October, 1904, in the words and figures following, to wit:

The United States of America, Philippine Islands. In the Court of First Instance of the City of Manila.

THE UNITED STATES, COMPLAINANT, *vs.* JOHN M. FLEMISTER, DEFENDANT.	Criminal assault upon the agents of the authority.

A note of the statements made with respect to the complaint upon arraignment in the above-entitled cause.

The accused, on being cited to appear, protested against the reading of the complaint in the above-entitled cause and stated that he was not guilty of the accusations therein contained. The accused furthermore also set up the allegations that he had already been prosecuted and acquitted for the infraction of the ordinances of the city of Manila, on a complaint duly filed in the Municipal Court of the city of Manila, and based upon the same facts and evidence, and stated to have been committed at the same time referred to in the allegations in the present complaint.

(Signed) JOHN M. FLEMISTER,
By H. D. TERRELL, *His Attorney.*

5 Filed this 24th day of October, 1904. C. A. Sobral, assistant clerk, Court of First Instance, Manila, P. I.

* * * * * * *

9 *Testimony of Mr. Henry E. Metcalf.*

Swears in legal form and says his name is Henry E. Metcalf; that he is a resident of Manila and is clerk of the Municipal Court.

* * * * * * *

10 PROSECUTION. I offer in evidence case number 1698 of the Municipal Court of the city of Manila against John M. Flemister for infraction of ordinances. In this case the accused was, on June 7th, 1904, found guilty and sentenced to pay a fine of ten dollars gold ($10.00 U. S. C.).

I also introduce case number 13637, The United States vs.
11 John M. Flemister, charged in the same court with assault. In this case the accused was found guilty and sentenced to pay a fine of three dollars gold.

By Mr. TERRELL:

Q. Are these the records, here presented in evidence, which you found with respect to the cases against Flemister?

A. Yes, sir; I found five in all.

Q. I hand you this document and ask you if you, as clerk, recognize it as a Municipal Court record?

A. Yes, sir.

Mr. TERRELL. I offer this document in evidence.

The COURT. The document is admitted.

Mr. TERRELL. In offering these documents, I would like to have the complaints copied and the copies attached to the record in this case.

The COURT. Copy the complaints and attach the copies to the record.

[NOTE BY SOLICITOR GENERAL. These particular complaints in the Municipal Court, although directed by the Court of First Instance to be attached to the record, appear to have been inadvertently omitted.]

By the PROSECUTION:

Q. What is the fifth complaint?

A. The fifth complaint is for resisting arrest. The trial took place October 21st, 1903. This case was dismissed.

* * * * * * *

87a United States of America, Philippine Islands.

In the Municipal Court for the City of Manila.

THE CITY OF MANILA, PLAINTIFF, *vs.* JOHN M. FLEMISTER, DEFENDANT.	X 2408. Complaint: Violation of ordinances.

The undersigned accuses John M. Flemister of the misdemeanor of violation of ordinances of the city of Manila, Philippine Islands, committed as follows:

That on or about the 2nd day of October, 1904, in the city of Manila, Philippine Islands, and in a public place in said city wherein various persons were gathered together, and within the hearing and view of such persons, the said John M. Flemister did then and there wilfully and unlawfully make and assist in making a disorder, disturbance, and breach of the peace, and did then and there assault, beat, and use personal violence upon one Domingo Salvador, without just cause; all contrary to the provisions of section 1 of Ordinance

No. 28, enacted by the municipal board of the city of Manila March 19, 1902.

(Signed) JOSE DE CRAME.

Subscribed and sworn to before me and in my presence in the city of Manila, Philippine Islands, this 5th day of October, 1904, by said Jose de Crame.

(Signed) H. E. METCALF,
Acting Clerk Municipal Court, City of Manila.

Identifying signature:
H. D. TERRELL.

Witnesses.	Addresses.
Captain Jose Crame	Tondo Station.
Patrolman Feliciano Celemin	Tondo Station.
Patrolman Francisco Cruz	" "
Corporal Antonio Acuña	" "
Domingo Salvador	c/o " "
Faustino Villanueva y Vergara	San Lazaro Race Track.
James B. Cooley	Secret Service Bureau.
Lieut. H. C. Leerson, P. C	Santa Lucia Barracks.

HDG/ccm/10–5–04.
Guilty, ₱40. Bond, ₱40.
Oct. 11, 9 a. m.
Oct. 12, 9 a. m.
Oct. 14, 9.30.

Stipulated in open court that case No. 2409 be consolidated and heard at same time.

87b United States of America, Philippine Islands.

Stipulation in open court that case # 2409 be consolidated and

THE CITY OF MANILA, PLAINTIFF,
vs.
JOHN M. FLEMISTER, DEFENDANT. } X 2409. Complaint: Violation of ordinances.

The undersigned accuses John M. Flemister of the misdemeanor of violation of ordinances of the city of Manila, Philippine Islands, committed as follows:

That on or about the 2nd day of October, 1904, in the city of Manila, Philippine Islands, in a public place in said city where various persons were gathered together, and within hearing of such persons, the said John M. Flemister did, then and there, wilfully and unlawfully utter slanderous, threatening, and abusive language and expressions of and to Captain Jose Crame, of the Manila Police Department, namely, the said John M. Flemister did, then and there, say of and to the said Captain Jose Crame in said public place " You

are a God-damned son of a bitch googoo " and various other profane and unseemly expressions; all contrary to the provisions of section 1 of Ordinance No. 28, enacted by the municipal board of the city of Manila, March 19, 1902.

(Signed) JOSE DE CRAME.

Subscribed and sworn to before me and in my presence in the city of Manila, Philippine Islands, this 5th day of October, 1904, by the said Jose Crame.

(Signed) H. E. METCALF,
Acting Clerk, Municipal Court, City of Manila.

Witnesses.	Addresses.
Captain Jose Crame	Tondo Station.
Patrolman Feliciano Celemin	" "
Francisco Cruz	" "
Corporal Antonio Acuña	" "
Domingo Salvadar, c/o	" "
Faustino Villanueva y Vergara	San Lazaro Race Track.
James B. Cooley	Secret Service Bureau.
Lieut. H. C. Leerson, P. C	Santa Lucia Barracks.

HDG/CCM/10-5-04.
Oct. 11, 9 a. m.
Oct. 12, 9 a. m.
Oct. 14, 9.30.
Dismissed. Bond, ₱40.
Identifying signature,
H. D. TERRELL.

87c United States of America, Philippine Islands.

In the Municipal Court, city of Manila, Philippine Islands.

THE CITY OF MANILA, COMPLAINANT,
vs.
JOHN M. FLEMISTER, DEFENDANT. } Cases Nos. X 2408 and X 2409. Consolidated.

The defendant is charged in each of the cases at bar with an infraction of the provisions of section 1 of ordinance 28 of the municipal board of the city of Manila. The complaint in case No. X 2408 charges the defendant generally with disorderly conduct and further with the specific act of striking one Domingo Salvador. The complaint in case No. X 2409 charges the defendant with using threatening and abusive language to one José Crame.

By stipulation in open court the two cases were consolidated for trial. The evidence in support of the two complaints showed that all the acts, which might be considered any part of the offense or offenses charged in the two complaints, took place within the space

of a few minutes, as a succession or series of events, closely connected without any mark or well defined interval between.

In the opinion of this court the law of procedure in force in the Philippine Islands does not countenance a multiplication of prosecutions against the same defendant for an offense made up of a series of acts which can not clearly and with certainty be dissociated from each other so as to be readily recognized as two or more separate and distinct breaches of the law. This principle is particularly applicable where both prosecutions are brought under the same section of the same ordinance, and where the allegations of the second complaint, i. e., the one charging abusive language, might legally, consistently, and in keeping with the rules of good pleading have been included in the first complaint charging disorderly conduct.

For this reason case No. X 2409 is dismissed. The evidence bearing upon the allegations of case No. X 2409 is taken into consideration in reaching a judgment in case No. X 2408. In the latter, the defendant, John M. Flemister, is found guilty of disorderly conduct amounting to an infraction of the provisions of section 1 of Ordinance 28 of the municipal board of the city of Manila, and sentenced to pay a fine of forty pesos (₱40.00), Philippine currency.

(Signed) FRANK B. INGERSOLL,
Acting Municipal Judge, City of Manila.

That thereafter, and on the 3rd day of February, 1905, said defendant was found guilty by the honorable Manuel Araullo, said presiding judge of Part I of the Court of First Instance of the city of Manila, of the offense of resisting the agents of the authorities, in a judgment in the words and figures following:

88 United States of America, Philippine Islands.

In the court of first instance of the city of Manila.

THE UNITED STATES *vs.* JOHN FLEMISTER. } No. 1826. Assault against an agent of the authorities.

Judgment.

It was proved at the trial that on the afternoon of the third of October of the year last past, while some horse races were being held at the San Lazaro race track belonging to the Jockey Club of this city, the accused, John Flemister, who was on the track, entered the enclosure reserved for the members of the society, among which the accused was not numbered, and notwithstanding that he had been warned by Domingo Salvador, who was in charge of the enclosure, that not being a member of the society and the enclosure being reserved exclusively to members, he could not be admitted

therein; that notwithstanding this warning, the accused, Flemister, insisted on climbing into and remaining in the enclosure, occasioning a violent altercation with the said Domingo Salvador, as the result of which, as well as of the violent manner in which he climbed into the place, the gate of the enclosure was broken; that as a result
89 of this disorder, of which the policeman Feliciano Celemin, who was in uniform and was on duty at the track, was informed, the latter intervened in the altercation between Flemister and Salvador, and in view of the obstinacy of the former in persisting in remaining in the enclosure, and of the fact that disorder was caused in the public view, he tried to arrest Flemister and told him that he was a prisoner; that Flemister forcibly opposed his arrest by the said policeman; that later the Corporal Pablo Acuña and afterwards Captain Crame, who were also at the track on the occasion in question, intervened in the altercation; that the accused, Flemister, not only disregarded and depreciated the intervention of the policeman, Feliciano Celemin, Pablo Acuña, and Captain Crame, but continued his opposition to being arrested, resisting this to the point that where, according to said Feliciano Celemin and Corporal Acuña, he struck the first in the stomach and the second in some other part of the body, and cast indecent and insulting epithets at Celemin, saying in the presence of all the people there congregated that he would not permit himself to be arrested by any "Son of a bitch googoo," alluding, doubtless, to the policeman, Feliciano Celemin, as well as to the other Filipino policemen present at the track, and, lastly, that in view of the determined resistance of the accused, Flemister, to being arrested, Captain Crame, in order to avoid greater disorder, greater scandal than that which had been produced by the preceding acts, desisted from his purpose of effecting the arrest of the accused
90 Flemister, which was not accomplished even by the intervention of an American policeman of the secret service, named Colley. These facts have been classified in the complaint as the crime of an assault upon an agent of the authorities, provided for and punished in paragraph 2 of article 249, in connection with paragraph 3 of article 250 of the Penal Code, the defendant, Flemister, being accused of having resisted, on the occasion referred to, the policeman then on duty, assaulting the policeman Feliciano Celemin. These facts being duly appreciated, the occasion, the circumstances, and the manner in which they were unrolled being taken into account, they do not, in the judgment of the court, constitute a crime of an assault upon an agent of the authorities, defined and punished in said article 249, nor that defined in article 250, nor that referred to in 251 of the said Code. They constitute the crime covered and punished by article 252 of the Code; that is, grave resistance and disobedience to an agent of the authority in the exercise of the duties of his office. It must be taken into consideration that the law punishes as the crime of an assault on the authorities or their agents, covered by the three articles first mentioned, the act of seri-

ously resisting the authorities or their agents, assaulting them, employing force against them, or making some serious resistance. In the present case, taking into consideration the circumstances surrounding the accused, Flemister, and the policemen Feliciano Celemin, Pablo Acuña, the altercation which preceded the statement by the policeman Celemin, that the accused, Flemister, was under arrest,
91 that Flemister opposed his apprehension by the policeman Celemin, and, notwithstanding the opposition of the porter, Salvador, climed into the enclosure, sat down in one of the seats therein, and maintained an attitude, although in a certain degree passive, was sufficiently violent. It cannot be said that the accused, Flemister, assaulted or gravely intimidated the policemen, nor that he seriously resisted them. It is clearly understood that an altercation between Domingo Salvador and the accused, Flemister, took place; that the policeman Celemin intervened a few moments afterward; that later, Corporal Acuña, and, lastly, Captain Crame, appeared on the scene; that the accused, Flemister, while Celemin was in front of him, and he was opposing his arrest, made some movement to rid himself of the presence of the policeman. This movement, although more or less violent, cannot be considered from a legal point of view to have the character of an assault upon an agent of the authorities. It should rather be deemed an accidental circumstance of the disobedience of Flemister to the policeman Celemin, and a resistance to his arrest by the policeman. The supreme court of Spain, in the judgments of the 25th of April, 1877, and the 28th of December, 1885, has laid down this doctrine in cases identical to the one at bar. The aggression, if such may be called the movement made by the accused, Flemister, in striking the body of the policemen Celemin and Corporal Acuña, has not the character of such an assault. It was a material manner of showing his resistance and disobedience to the policeman. For this reason the act must be qualified as grave resistance and disobedience. If the accused,
92 Flemister, had not made the policeman the object of his insulting epithets on that occasion, and under those circumstances, but had confined himself to maintaining an aggressive attitude to the point of striking the policeman, if the act had been limited solely to disobedience, Flemister maintaining passive attitude toward the policemen Celemin, Captain Crame, and Corporal Acuña, then that disobedience could not be classified as grave. It would be merely a slight disobedience, and would be punished as a breach of the peace. But in the present case it is evident that the disobedience of the accused, Flemister, to the policemen was serious. It was accompanied by circumstances that show its gravity, and bring the act within article 252, although not within articles 250 and 251 of the Penal Code, and must be classified as serious resistance and disobedience to an agent of the authority. The simple act of disobeying and resisting an agent of the authority, and putting violent hands upon him, cannot be classified as an assault under articles 250 and

251. Although these articles classify as a determining circumstance of the crime of assault the putting of the hands upon the authorities or their agents in connection with resistance or disobedience, the act of "putting the hands," the phrase employed in these articles, must be understood in the sense of assault, an aggression in connection with the serious intimidation. It is indubitable that these circumstances did not occur in the present case. For this reason,

93 even conceding that the accused struck the policemen Celemin and Acuña, this would not be classified as an assault upon the agents of the authorities. In this case it has been proved that the accused struck the two policemen. The testimony of the latter and of others at the trial prove it conclusively. If it is true that some of the witnesses for the defense said that he did not see the accused fighting or assaulting the policeman Celemin, or any other policeman, these might have arrived at the scene of the occurrence some moments after the blow was given the policeman Celemin. It is to be taken into account that Captain Crame testified that the accused did not strike anyone in his presence, but Captain Crame arrived after the policeman Celemin told the accused that he was under arrest, and after, doubtless, the accused, Flemister, had struck the body of Celemin. It is necessary, therefore, to take into consideration these two circumstances—that of the accused having struck the policeman Celemin, and that of having made him the object of insulting and calumnious names when he said that he would not permit hiself to be arrested by the policeman, qualifying it with a depreciative epithet. The act, therefore, constitutes serious resistance and disobedience to an agent of the authorities.

In the present case the allegation by the defense that the accused had already been tried by this court for the same offense—in other words, the plea of jeopardy—can not be deemed well founded. Granting that the Municipal Court consolidated two cases against the same defendant with the numbers 2408 and 2409, these two cases

94 do not refer to the very same criminal offense prosecuted herein. In one of them Flemister was accused of having started a disturbance or breach of the peace, and assaulted and struck one Domingo Salvador, a porter at the San Lazaro race track. In the other he was accused of having made Captain Crame the object of insulting words in the same place. In this court another case against the accused for a breach of the peace was consolidated with this under the number 1229. In the complaint filed in the latter case the act of having resisted and disobeyed or assaulted the policeman, Feliciano Celemin, on the occasion in question, an act which is the specific subject of the sentence in the present case, was not included. The accused is therefore guilty of the crime covered and punished by the said article 252 of the penal code.

In the commission of the crime the aggravating circumstance of two prior convictions of a crime for which the law assigns a lighter penalty must be considered, it appearing that the defendant was

twice convicted in the Municipal Court of the city of Manila. This circumstance being taken into consideration, and there being no mitigating circumstance to offset it, the accused should be condemned to the corresponding penalty in its maximum grade.

I sentence the accused, John M. Flemister, to the penalty of four months and ten days of arresto mayor, with the accessories of article 61, to a fine of two thousand pesetas, and, in case of insolvency, to suffer corresponding subsidiary imprisonment not to exceed a
95 third part of the principal penalty, and to the payment of the costs. So ordered.

Manila, February 3, 1905.

(Signed) MANUEL ARAULLO, *Judge.*

That thereafter, to wit, on the 9th day of February, 1905, the defendant gave due notice of appeal from said judgment.

That thereafter, and on the 17th day of April, 1905, said cause was duly remitted by the clerk of said Court of First Instance of Manila to the Supreme Court of the Philippine Islands, and was on said day duly filed and entered as a pending cause in said Supreme Court of the Philippine Islands.

That thereupon and thereafter, in the said Supreme Court of the Philippine Islands, the said United States, plaintiff and appellee, was represented by the Honorable Gregorio Araneta, solicitor-general of the Philippine Islands, and the said defendant was represented in the said court by Mr. Howard D. Terrell, as his attorney, and after due proceedings had and presentation of printed briefs, and oral argument of counsel in the said cause, said cause was on the 28th day of November, 1905, finally heard by said Supreme Court of the Philippine Islands, and thereafter, on the 26th day of February, 1906, the following decision was rendered by the said Supreme Court in the said cause:

96 United States of America. In the Supreme Court of the Philippine Islands.

UNITED STATES
vs.
JOHN M. FLEMISTER. } No. 2618.

JOHNSON, J.

This defendant was charged with the crime of a criminal attempt against the agent of the authorities, as follows:

"That on or about the second day of October, 1904, in the city of Manila, Philippine Islands, the said John M. Flemister did, then and there, wilfully, unlawfully, and feloniously attack an agent of the public authorities, to wit, Feliciano Celimin, a duly appointed, qualified, and acting police officer of the city of Manila, and did then and there employ force against, gravely intimidate, and offer grave

resistance to the said Feliciano Celimin while he was discharging the functions of his office and on the occasion thereof, and did, then and there, lay hands upon the said Feliciano Celimin while he was discharging the duties of his office in this, that on the said 2nd day of October, 1904, the said Feliciano Celimin, among other police officers of the city of Manila, was detailed and designated by the authorities to preserve the peace at San Lazaro race track, of the city of Manila, and that, then and there, the said John M. Flemister did commit, in the presence and view of the said Celimin, an assault and breach of the peace; and that the said Celimin then and there attempted to place the said Flemister under arrest for such offense; and that the said Flemister thereupon resisted such arrest and attacked and struck the said Feliciano Celimin and used vile, insulting, profane, and obscene language to the said Feliciano Celimin; by reason of which attack, force, intimidation, and resistance towards the said Feliciano Celimin the authorities of the city of Manila were compelled to yield to the exactions of the said Flemister and refrain from the arrest of said Flemister; that the said offense was accompanied by the following aggravating circumstances:

97 "That the said John M. Flemister has been previously punished for two or more crimes for which the law fixes a lighter penalty than that prescribed by law for the offense charged herein.

(Signed) "JOSE DE CRAME."

The complaint was duly sworn to.

The complaint was presented on the 5th day of October, 1904, and the defendant was arrested upon the same day. On the 20th day of October, 1904, the defendant was duly arraigned and after hearing read the foregoing complaint pleaded "not guilty" of the crime of which he was accused in the said complaint, and alleged also that he had already been dismissed in a competent court for the same crime.

The inferior court found that the defendant had been accused of a violation of section 1 of Ordinance 28 of the city of Manila and had been tried by the Municipal Court of said city, and that the offenses with which the defendant had been charged in said Municipal Court did not include the one with which he was charged in the complaint in this cause. The complaints presented against this defendant in the Municipal Court were as follows:

1st:

"The undersigned accuses John M. Flemister of the misdemeanor of violation of ordinances of the city of Manila, Philippine Islands, committed as follows:

"That on or about the 2nd day of October, 1904, in the city of Manila, Philippine Islands, and in a public place in said city, wherein various persons were gathered together, and within the hearing and view of such persons, the said John M. Flemister did, then and there, wilfully and unlawfully, make and assist in making a disorder, disturbance, and breach of the peace, and did, then and there, assault, beat, and use personal violence upon one Domingo Salvador, without

just cause; all contrary to the provisions of section 1 of Ordinance No. 28, enacted by the municipal board of the city of Manila, March 19, 1902.

(Signed) "JOSE CRAME.

98 The complaint was duly sworn to.

2nd:

"The undersigned accuses John M. Flemister of the misdemeanor of violation of ordinances of the city of Manila, Philippine Islands, committed as follows:

"That on or about the 2nd day of October, 1904, in the city of Manila, Philippine Islands, in a public place in said city where various persons were gathered together, and within hearing of such persons, the said John M. Flemister did, then and there, wilfully and unlawfully, utter slanderous, threatening, and abusive language and expressions of and to Captain Jose Crame, of the municipal police department, namely, the said John M. Flemister did, then and there, say of and to the said Captain Jose Crame in said public place: 'You are God-damned son-of-a-bitch gugú,' and various other profane and unseemly expressions; all contrary to the provisions of section 1 of Ordinance No. 28, enacted by the municipal board of the city of Manila, March 19, 1902."

(Signed) "JOSE CRAME."

The complaint was duly sworn to.

By stipulation in open court, these two complaints were consolidated for trial. After hearing the evidence in said cause, the judge of the Municipal Court dismissed the second complaint, and taking into consideration the evidence introduced to support the second complaint, as well as the evidence in first complaint, found the defendant guilty of the facts charged in the first complaint and sentenced him to pay a fine of forty pesos, Philippine currency.

From an examination of the offenses charged in the three complaints, the two in the Municipal Court and the one in the Court of First Instance, for which the defendant was tried, it will be seen that the complaint which was filed in the Court of First Instance of the city of Manila, charged the defendant with a "criminal at-

99 tempt against one Feliciana Celimin, a policeman of the city of Manila and an agent of the authorities," while the complaint in the first case in the Municipal Court charged the defendant generally with "disorderly conduct and with striking one Domingo Salvador." The second complaint filed in the Municipal Court charged the defendant with using "threatening and abusive language to one Jose Crame." These offenses are separate and distinct. Therefore the inferior court was justified in denying the plea presented by the defendant of "autrefois aquit."

Even though it should be admitted that the defendant had been proceeded against in the Municipal Court for a crime resulting from the same acts with which he was charged in the Court of First Instance, yet nevertheless he would not be entitled to be acquitted under his plea of "autrefois aquit" for the reason that the acts with which

he was charged in the Municipal Court constituted a violation of section 1 of Ordinance No. 28 of the city of Manila, and the acts with which he was charged in the complaint in the Court of First Instance constituted an offense punishable under the Penal Code, and were distinct offenses.

This court has recently decided in the case of United States vs. Chan-Cun-Chay (4 Official Gazette, page 42) that "Where the same acts constitute an offense against each of two sovereignties exercising jurisdiction over the same territory, a prosecution brought by one does not necessarily bar a prosecution by the other."

It is not necessary to invoke this doctrine here in this case
100 for the reason that the offences with which the defendant had been charged in the said Municipal Court did not include the offense for which he was tried in the Court of First Instance.

An examination of section 1 of Ordinance No. 28 of the city of Manila, in comparison with articles 249 and 250 of the Penal Code, will also show that the two laws punish different offenses. Section 1 of Ordinance No. 28 provides:

"No person shall make, aid, countenance, or assist in making any riot, affray, disorder, disturbance, or breach of the peace; or assault, beat, or use personal violence upon another without just cause in any public place; or utter any slanderous, threatening, or abusive language, or expression; or exhibit or display any emblem, transparency, representation, motto, language, device, instrument, or thing; or do any act, in any public place, meeting, or procession, tending to disturb the peace or excite a riot; or collect with other persons in a body or crowd for unlawful purpose; or disturb or disquiet any congregation engaged in any unlawful assembly."

Paragraph 2 of article 249 of the Penal Code provides that the following persons are guilty of a criminal attempt:

"Those who attack the authorities or their agents, or employ force against them, or gravely intimidate them, or offer an equally grave resistance while they are discharging the functions of their office or on the occasion thereof."

Article 250 provides:

"The criminal attempts included in the preceding article shall be punished with the penalties of prison correccional in its medium degree to prision mayor in its minimum degree, and a fine of from 625 to 6,250 pesetas, provided that any of the following circumstances are attendant:

"1. If the aggregation were accomplished by weapons;

"2. If those guilty thereof were public officials;

101 "3. If the delinquents laid hands upon the authorities;

"4. If in consequence of compulsion the authorities should have yielded to the exactions of the delinquents.

"5. Without these circumstances the penalty should be prision correccional in its minimum to its medium degree and a fine of from 375 to 3,750 pesetas."

After hearing the evidence the inferior court found the defendant

guilty of the crime provided for and punished under article 252 of the Penal Code and taking into consideration the fact that the defendant had been condemned twice for an offense for which the law imposes a less penalty, as an aggravating circumstance, sentenced the defendant to be imprisoned for a period of four months and ten days of arresto mayor, with the accessories of the law provided for in article 61 of the Penal Code, to pay a fine of 2,000 pesetas, to suffer in case of insolvency imprisonment, which should not exceed one-third part of the principal penalty, and to pay the costs. From this decision the defendant appealed to this court.

From an examination of the evidence adduced during the trial of said cause in the court below we adduce the following facts:

That on the 2nd day of October, 1904, while attending the races at San Lazaro race track in the city of Manila, the defendant attempted to pass through a gateway leading to a portion of the grand stand of said race track which was and had been for some time prior thereto reserved exclusively for members of the association in charge of said race track, which association was known as the Manila
102 Jockey Club; that one Domingo Salvador was an attendant at said gate in the employment of said association and was instructed to allow no one to pass through the said gate except members of the association; that the defendant attempted to pass through the said gate and was informed that he could not pass through because he was not a member of said association; that thereupon the said defendant, by means of force, broke open the said gate and passed through into that portion of the grand stand reserved for members; that this action on the part of the defendant was reported to a policeman, called Feliciano Celemin, who was stationed by the proper authorities near the said gate to assist in the maintenance of order; that the defendant, in passing through the gate, threw the attendant, Salvador, to the ground, while he, the said attendant, was attempting to prevent the defendant from passing through the said gate; that when the said policeman, Celimin, saw this conduct on the part of the defendant, he approached the defendant and attempted to place him under arrest, whereupon the defendant struck the said policeman in the stomach; that during this proceeding the defendant used vile, abusive, and threatening language towards the said Celimin, as well as to the other policemen who had assembled there in the meantime.

From these facts we are of the opinion that the defendant is guilty of a violation of the provisions of paragraph 2 of article 249 of the Penal Code and must be punished under paragraph 5 of article 250 of the same code.

103 Under this conclusion of fact it becomes necessary, under the provisions of the Penal Code applicable to the same, to impose a severer penalty than that imposed by the lower court. The question now arises has this court the right, when a defendant appeals from the decision of an inferior court, to modify or revoke the sentence of such inferior court and increase the penalty. This court

has already decided in numerous cases that it has that authority. See United States vs. Trono, 2 Official Gazette, 296; United States vs. Flemister, 3 Official Gazette, 386.

In the case of United States vs. Flemister this court said:

"The court has the power, whenever a final judgment in any criminal case shall be reversed upon appeal by the defendant on account of errors committed by the inferior court in imposing the penalty under the law, to render such judgment in said case as should have been rendered by the inferior court."

In the case of United States vs. Trono, the defendant appealed to the Supreme Court of the United States, upon the theory that this court had no authority to increase the penalty imposed by the inferior court, for the reason that thus the defendant had been put in jeopardy twice for the same offence.

The Supreme Court, in its decision of the 4th of December, 1905, sustained the decision of this court. In deciding the case, Mr.
104 Justice Peckham, who wrote the majority opinion, said among other things:

"When at his own request he (the defendant) has obtained a new trial, he must take the burden with the benefit and stand for a new trial of the whole case. It does not appear to us to be a practice founded on solid reason to permit such a limited waiver (of jeopardy) by the accused party, while he himself is asking for a reversal of the judgment." * * *

"A further question is made as to the power of the Supreme Court of the (Philippine) Islands to reverse the judgment appealed from and itself convict the accused on appeal. The Supreme Court (of the Philippine Islands) in so doing acted within its power and jurisdiction. It is a result of the ordinary procedure in the courts of that country (the Philippine Islands), proceeding under the act of Congress."

The judgment of the inferior court is therefore hereby revoked and the defendant is hereby sentenced to be imprisoned for a period of two years and six months of prisión correccional, to suffer the accessory penalties provided for in article 61 of the Penal Code, to pay a fine of 3,750 pesetas, and in case of insolvency to suffer subsidiary imprisonment for a period not to exceed one-third of the principal penalty, and to pay the costs.

It is so ordered.

105 That thereafter and on the 7th day of March, 1906, the Honorable L. M. Southworth, attorney for the defendant, moved for a rehearing of the said cause, which, on the 14th of March following, the said Supreme Court denied.

That thereafter, and on the 21st of March, 1906, final judgment was duly entered in the said cause.

That thereafter, and on the 24th of March, 1906, the Honorable L. M. Southworth, attorney for the defendant, duly excepted to the said order of the said Supreme Court of the 14th of March preceding, denying the defendant's motion for a rehearing.

That thereafter and on the 28th of March, 1906, the Honorable L. M. Southworth, attorney for the defendant, duly excepted to the final judgment of the said Supreme Court in the said cause.

That thereafter, and on the 28th day of March, 1906, the said defendant, by said Honorable L. M. Southworth, his counsel, presented a petition in error to the honorable the Supreme Court of the United States, in the said cause, together with his assignment of error, as follows, to wit:

United States of America. In the Supreme Court of the Philippine Islands.

UNITED STATES, PLAINTIFF AND APPELLEE,
vs.
JOHN M. FLEMISTER, DEFENDANT AND APPELLANT.

106 *Petition for writ of error.*

The defendant and appellant feeling himself aggrieved by the decision of the court made on February 26, 1906, and the judgment entered thereon on the 21st of March, 1906, comes now by L. M. Southworth, his attorney, and petitions the court for an order allowing the defendant and appellant herein to prosecute a writ of error in the Supreme Court of the United States under and according to the laws of the United States in that behalf made and provided; and that an order be made fixing the amount of security which defendant shall give pending said writ of error; and that upon the giving of said security all further proceedings in this court be suspended and stayed until the determination of said writ of error by said Supreme Court of the United States.

(Signed) L. M. SOUTHWORTH,
Attorney for Defendant and Appellant.

Escolta, 34, Manila, P. I.

Filed in the clerk's office of the Supreme Court of the Philippine Islands this 28th day of March, 1906, at 3 p. m.

J. E. BLANCO, *Clerk.*

United States of America. In the Supreme Court of the Philippine Islands.

UNITED STATES, PLAINTIFF AND APPELLEE,
vs.
JOHN M. FLEMISTER, DEFENDANT AND APPELLANT.

107 *Assignment of errors.*

Comes now the above-named defendant and appellant by his attorney, L. M. Southworth, and presents the following assignment of errors, which he avers occurred upon the hearing of said case and

upon which he will rely in the prosecution of his writ of error in the above-entitled case:

First. This court erred in determining that it had jurisdiction to increase the sentence of the court of first instance in this cause, from which an appeal was taken by the accused to this court.

Second. The Supreme Court of the Philippine Islands has no original jurisdiction in criminal cases and the decision of the court in this case in effect converts the Supreme Court of the Philippine Islands into a court of original jurisdiction, and deprives the accused of the right to be confronted by the witnesses against him before the tribunal which considers and determines the facts.

Third. The decision of the court which deprives the accused of his liberty without due process of law, which right is guaranteed by section 5 of the act of Congress approved July 1, 1902, known as the "Philippine bill."

Fourth. The decision of the court places the accused twice in jeopardy for the same offense according to the corresponding provisions of section 5 of the act of Congress of July 1, 1902.

Wherefore, the said defendant and appellant (plaintiff in error) prays that the judgment of the Supreme Court of the Philip-
108 pine Islands be reversed and said cause against him be dismissed, and that he go hence without day.

(Signed) L. M. SOUTHWORTH,
Attorney for Plaintiff in Error.

Escolta, 34, Manila, P. I.

Filed in the clerk's office of the Supreme Court of the Philippine Islands this 28th day of March, 1906, at 3 p. m.

(Signed) BLANCO, *Clerk.*

That thereafter and on the 30th day of March, 1906, a writ of error was duly granted by the Honorable E. Finley Johnson, one of the associate justices of the Supreme Court of the Philippine Islands, in said cause, as follows:

United States of America. In the Supreme Court of the United States of America.

JOHN M. FLEMISTER, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES, DEFENDANT IN ERROR. } Writ of error.

UNITED STATES OF AMERICA,
Philippine Islands, ss:

The President of the United States of America to judges of the Supreme Court of the Philippine Islands, greeting:

109 Because in the record and proceedings and also in the rendition of the judgment in the said Supreme Court of the Philippine Islands, before you or some of you, between the United

States of America, plaintiff and appellee, against John M. Flemister, defendant and appellant, a manifest error hath happened, to the great damage of said John M. Flemister, as he said and appears in his petition for a writ of error, we, being willing that such error, if any hath happened, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you that judgment be therein given; that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 27th day of July next, in said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States ought to be done.

Witness, the Hon. Melville W. Fuller, Chief Justice of the United States, this 30th day of March, in the year of A. D. 1906, and of the independence of the United States the 131st.

(Signed) J. E. BLANCO,
Clerk of the Supreme Court of the Philippine Islands.

[Seal of the Supreme Court of the Philippine Islands.]

110 The foregoing writ is allowed and upon the filing in the office of the clerk of this court by said plaintiff in error of a bond in the sum of twenty-five hundred pesos, conant, approved by me, it is ordered that said writ of error shall operate as a super*sidious* and stay of execution.

Dated Manila, P. I., March 30th, 1906.

(Signed) E. FINLEY JOHNSON,
Associate Justice of the Supreme Court of the Philippine Islands.

[Seal of the Supreme Court of the Philippine Islands.]

That on the thirtieth day of March, 1906, a supersidious bond was filed by the said defendant in the said cause, as follows, to wit:

United States of America. In the Supreme Court of the Philippine Islands.

UNITED STATES, PLAINTIFF AND APPELLEE,
vs.
JOHN M. FLEMISTER, DEFENDANT AND APPELLANT. } No. .

Whereas John M. Flemister, the defendant in the above-entitled action, has taken a writ of error to the Supreme Court of the United States of America for a review of the judgment rendered by the Supreme Court of the Philippine Islands, condemning the said defendant to two years and six months of prisón correccional, and to pay a fine of 3,500 pesetas.

111 Now, therefore, in consideration of the premises and of the granting by the Supreme Court of the Philippine Islands of a writ of error to the Supreme Court of the United States of America in favor of said defendant, John M. Flemister,

We, John M. Flemister, as principal, and Walter E. Olsen and E. M. Bachrach, as sureties, do hereby acknowledge ourselves to be held and firmly bound, jointly and severally, to the United States of America in the sum of two thousand five hundred pesos (₱2,500) Philippine currency, to the payment of any and all costs which may be awarded against said defendant, John M. Flemister, not exceeding two thousand five hundred pesos (₱2,500) upon the prosecution of said writ of error in the Supreme Court of the United States.

In witness whereof, we have set our hands in Manila, P. I., this 30th day of March, 1906.

(Signed) JOHN M. FLEMISTER.
(Signed) WALTER E. OLSEN.
(Signed) E. M. BACHRACH.

CITY OF MANILA,
Philippine Islands, ss:

Walter E. Olsen and E. M. Bachrach, the sureties who signed the preceding obligation, being first duly sworn, upon oath each for himself, says that he is a resident and proprietor of the city of Manila, and that he is solvent in the sum mentioned in said obligation with exclusion of all debts and obligations and with exclusion of property subject to execution.

(Signed) WALTER E. OLSEN.
(Signed) E. M. BACHRACH.

112 Subscribed and sworn to before me this 30th day of March, 1906.

J. E. BLANCO,
Clerk of the Supreme Court of the Philippine Islands,
Ex-officio Notary Public.

Approved:
E. FINLEY JOHNSON,
Associate Justice, Supreme Court.

[Seal of the Supreme Court of the Philippine Islands.]

That thereupon and on said 30th day of March, 1906, due citation was issued in the cause of John M. Flemister, plaintiff in error, against the United States, defendant in error, as follows, to wit:

United States of America. In the Supreme Court of the United States of America.

UNITED STATES OF AMERICA,
Philippine Islands, ss:

By the Hon. E. Finley Johnson, associate justice of the Supreme Court of the Philippine Islands: T. L. R. Wilfley, esq., attorney-

general of the Philippine Islands, attorney for the United States of America, and to the United States of America, greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at the Capitol in the
113 city of Washington, in the District of Columbia on the 10th day of July, 1906, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the Philippine Islands, wherein John M. Flemister is plaintiff in error and the United States is defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the city of Manila, in the Supreme Court of the Philippine Islands above named, this 30th of March, in the year of our Lord one thousand nine hundred and six, and the year of independence of the United States the one hundred and thirty-first.

(Signed) E. FINLEY JOHNSON,
Associate Justice of the Supreme Court of the Philippine Islands.

L. M. SOUTHWORTH,
Attorney for Plaintiff in Error.

Notice of citation is hereby acknowledged.

L. R. WILFLEY,
Attorney-General.

Manila, April 7, 1906.

[Seal of the Supreme Court of the Philippine Islands.]

114 In the Supreme Court of the United States.

JOHN M. FLEMISTER, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES, DEFENDANT IN ERROR.

And now come the said plaintiff in error, represented by his counsel, the Honorable Louis M. Southworth, and the said United States, defendant in error, represented by the Honorable Lebbeus R. Wilfley, attorney-general of the Philippine Islands, and hereby stipulate and agree that the foregoing is a true and correct record of all of the essential proceedings had and of all the evidence taken in the said above-entitled cause, both in the Court of First Instance of the city of Manila and in the Supreme Court of the Philippine Islands, and that any and all documents heretofore appearing in said original records in the said above-mentioned courts have been duly and correctly translated into the English language where necessary, and included in this record as a part thereof, and said parties, through their said counsel, further stipulate and agree upon

the foregoing record as being a true and correct record in said cause for presentation to the honorable the Supreme Court of the United States.

LOUIS M. SOUTHWORTH,
Counsel for Plaintiff in Error.
LEBBEUS R. WILFLEY,
Counsel for Defendant in Error.

115 UNITED STATES OF AMERICA,
Philippine Islands:

I hereby certify that the foregoing record and stipulation, consisting of one hundred and fourteen (114) typewritten pages, is a true and correct record of the proceedings had in the Court of First Instance of the city of Manila, and the Supreme Court of the Philippine Islands, in the above-entitled cause, as agreed upon between the parties to said cause, and that the same was compiled by me in conformity with the expressed desire and instructions of the said parties to said cause, acting through their respective counsel.

In witness whereof I have hereunto set my hand and caused to be affixed the seal of the Supreme Court of the Philippine Islands this thirty-first day of May, 1906.

[SEAL.]

H. D. MCGEORGE,
Deputy Clerk of the Supreme Court of the Philippine Islands, in Charge.

(Indorsement on cover:) File No. 20314. Philippine Islands Supreme Court. Term No. 349. John M. Flemister, plaintiff in error, vs. The United States. Filed July 23d, 1906. File No. 20314.

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UNITED STATES OF AMERICA

In the Supreme Court of the United States

October Term, 1907.

JOHN M. FLEMISTER,
Plaintiff in Error,
vs.
THE UNITED STATES,
Defendant in Error.
} No. 349

ASSIGNMENT OF ERRORS

FIRST ASSIGNMENT OF ERROR:

The Supreme Court of the Philippine Islands erred in not sustaining the plea of *autrefois convict* interposed by the accused in the Court of First Instance, in that the accused had been once tried and convicted upon a complaint in the Municipal Court charging him with an offense arising out of the same transaction as that with which he was charged in the complaint in the Court of First Instance.

SECOND ASSIGNMENT OF ERROR:

The Supreme Court of the Philippine Islands erred in reversing the judgment of the Court of First Instance and convicting the defendant of a different and higher offense than that of which he had been convicted by the Court of First Instance, in violation of Section 5 of the Act of Congress of July 1st, 1902, commonly known as the "Philippine Bill."

E. J. BOWERS,
Attorney for Plaintiff in Error.

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UNITED STATES OF AMERICA

In the Supreme Court of the United States

October Term 1907.

JOHN M. FLEMISTER,
Plaintiff in Error,
vs.
THE UNITED STATES.
Defendant in Error.

No. 349

STATEMENT OF FACTS

The foundation of the prosecution in this case arose out of an altercation which took place between the plaintiff in error and other parties at a race track in the city of Manila. Subsequently a complaint was filed against the plaintiff in error in the Municipal Court of the city of Manila charging him with the offense of "disorderly conduct," committed at the time of, and during said altercation. At the trial of said charge in the said court, the alleged fact of his "attempted assault" upon the same police officer as is mentioned in the complaint was given in evidence as constituting an element of the "disorderly conduct" for which the plaintiff in error was then being tried.

Upon this charge of "disorderly conduct" the plaintiff in error was convicted and satisfied the judgment of the court. This identical transaction is made the basis for the prosecution in this case.

BRIEF OF ATTORNEY FOR APPELLANT

FIRST ASSIGNMENT OF ERROR:

The Supreme Court of the Philippine Islands erred in not sustaining the plea of *autrefois convict* interposed by the accused in the Court of First Instance, in that the accused had been once tried and convicted upon a complaint in the Municipal Court charging him with an offense arising out of the same transaction as that with which he was charged in the complaint in the Court of First Instance.

While more than one offense may result from the same act and the prosecution may carve out of the transaction any one of the several specific offenses, yet the prosecution can take only one slice, or as is said by Mr. Bishop: "He must cut only once." (Bishop, Criminal Law Vol. 1, sections 894 & 891.)

While it is not ordinarily necessary to prove an attempted assault in order to establish the offense of "disorderly conduct," yet under the peculiar facts of the trial of the offense of "disorderly conduct" against the plaintiff in error it was absolutely necessary, because the attempted assault upon the police officer constituted the "disorderly conduct." The test is, can you eliminate from the whole proof, those facts which are and were necessary to make out the offense of "disorderly conduct" of which the plaintiff in error has been tried and convicted, and still have sufficient evidence upon which to convict him of the offense of which he has been convicted in this case. Certainly not, as the attempted assault upon the police officer was the basis of the charge of disorderly conduct and without the proof of that there could have been no conviction of disorderly conduct. All the evidence necessary to make out the "disorderly conduct" would be necessary to make out the attempted assault upon the police officer. Then there is really but one offense and to punish this plaintiff in error again would be to punish him twice for the same offense. In Fiddler vs. State (7 Hump. 508) defendant had been convicted for running a horse race upon a public road and fined. He was afterwards convicted for betting on same race. The

Supreme Court, upon appeal, reversed the judgment, holding the running of the race was a necessary ingredient in the offense charged and the party having been punished for that offense could not be punished again, although the offense was different.

SECOND ASSIGNMENT OF ERROR:

The Supreme Court of the Philippine Islands erred in reversing the judgment of the Court of First Instance and convicting the defendant of a different and higher offence than that of which he had been convicted by the Court of First Instance, in violation of Section 5 of the Act of Congress of July 1st, 1902, commonly known as the "Philippine Bill".

The Court of First Instance of the city of Manila found the plaintiff in error guilty of the crime provided for and punished under Art. 252 of the Penal Code and after finding him guilty of aggravating circumstances, consisting of two convictions in the Municipal Court of offenses similar to the one which the Court was then investigating, pronounced against him the maximum punishment of that article of the Penal Code, being four months and ten days imprisonment, a fine of two thousand pesetas and subsidiary punishment provided for in Section 61. The Supreme Court of the Philippine Islands reversed this judgment, convicted the plaintiff in error of a different crime provided for in Art. 249 of the Penal Code and sentenced him to be imprisoned for a period of two years and six months, to pay a fine of 3750 pesetas and to suffer the accessory penalties provided for in Section 61. If it can be construed that the offense charged in Art. 249 of the Penal Code was embraced in the complaint upon which the plaintiff in error was tried, he was acquitted of said offense when the Court of First Instance of the city of Manila convicted him of the lesser offense, to-wit, that contained in Art. 252 of the Penal Code. If the offense provided for in Art. 249 of the Penal Code was not embraced in the complaint upon which the plaintiff in error was tried, then the Supreme Court of the Philippine Islands had no authority to try and convict him of said offense.

By appeal from the judgment of the Court of First Instance of the city of Manila the accused did not waive his immunity from second jeopardy on the charge of the commission of the offense embraced in Art. 249 of the Penal Code. Hopt -vs- Utah, 110 U. S. 574; Thompson -vs- Utah, 170 U. S. 343; people -vs- Dowling, 84 N. Y. 478; Guenther -vs- People 24 N. Y. 100; People -vs- Cignarable 110 N. Y. 23, 30; Stuart -vs- Commonwealth 28 Gratt. 950; State -vs- Martin 30 Wisconsin 216; State -vs- Hills 30 Wisconsin 416; State -vs- Belden 33 Wisconsin 120; Stanghler -vs- State 6 Humph. 410; Brennan -vs- People 15 Illinois 511; Bamett -vs- People 54 Illinois 325; Sipple -vs- People 10 Bradwell 144; Morris -vs- State 8 S. & M. (Miss.) 762; Johnson -vs- State 29 Arkansas 31; State -vs- Tweidy 11 Iowa 350; State -vs- Ross 29 Missouri 32; State -vs- Kotteeman 35 Missouri 105; Johnson -vs- State 27 Florida 245; Golding -vs- State 31 Florida 262; Dennison -vs- State 31 La. Ann. 847; State -vs- Murphy 13 Washington 229; Bell -vs- State 48 Alabama 684; Berry -vs- State 65 Alabama 163; Brown -vs- U. S. 52 S. W. Rep. 56; Jones -vs- State 13 Texas 168; State -vs- Stevens 29 Oregon 85; People -vs- Knapp 26 Michigan 112, 113; People -vs- Comstock 55 Michigan 405, 407; George -vs- State Nebraska 163; State -vs- Ketter 2 Tyler (Utah) 472.

In the dissenting opinion of Mr. Justice Harlan of this Honorable Court, in the case of Trono -vs- U. S., the following language appears: "I desire to express my concurrence in the dissenting opinion of Mr. Justice McKenna, so far as it holds that the accused in the present case were entitled to the benefit of the jeopardy clause of the Constitution, and that after their acquittal in the tribunal assuming jurisdiction to try them for the crime of murder they could not thereafter in any appellate tribunal, deriving

its authority from the United States, be again tried for that crime *or for any other crime more serious than the one of which they were convicted in the Court of First Instance.*"

Respectfully submitted.

E. J. BOWERS,
Attorney for plaintiff in error.

In the Supreme Court of the United States.

OCTOBER TERM, 1907.

JOHN M. FLEMISTER, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 70.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR THE UNITED STATES.

By a complaint filed October 5, 1904, in the Court of First Instance at Manila, plaintiff in error was accused of the offense of attacking and resisting one Feliciano Celemin, a police officer at the San Lazaro race track, Manila, who was attempting to place him under arrest for assault and breach of the peace. The complaint alleged that Flemister, in resisting arrest, attacked and struck Celemin and used vile and insulting language toward him; and "that the said offense was accompanied by the following aggravating circumstances: That the said John M. Flemister has been previously punished for two or more crimes for which the law fixes a lighter penalty than that pre-

scribed by law for the offense charged herein." (Rec., p. 2.)

On being arraigned, accused entered pleas of not guilty and former jeopardy, alleging an acquittal in the Municipal Court of Manila upon a charge of infraction of the city ordinances based upon the same facts and evidence (p. 3).

The Court of First Instance found Flemister guilty of the offense of "resistance and disobedience to an agent of the authorities," under article 252 of the Penal Code, and imposed a sentence of four months and ten days' imprisonment (*arresto mayor*), and a fine of 2,000 pesetas, with costs (p. 50). On appeal the Supreme Court adjudged him guilty of a "criminal attempt" against an agent of the authorities, as provided for by paragraph 2, article 249, of the Code, punishable under article 250, and increased the sentence of the lower court to imprisonment for two years and six months of *prisión correccional*, with a fine of 3,750 pesetas and costs (pp. 55, 56). Thereupon defendant brought the case to this court on writ of error.

The assignments of error allege (1) that the Supreme Court of the Philippines had no jurisdiction to increase the sentence of the Court of First Instance; (2) that by so doing the court is converted into a court of original jurisdiction and accused is deprived of the right to be confronted by the witnesses against him; (3) that there was not due process of law; (4) that the accused was placed twice in jeopardy.

ARGUMENT.

The first three assignments of error are wholly without merit and may be referred to very briefly. The contention that there was not due process of law is the familiar claim so often advanced in cases coming to this court from the Philippines, and has no real meaning here. Defendant was convicted upon a complaint, duly sworn to, which clearly and sufficiently informed him of the charge against him, and all proceedings were regularly had in conformity with the laws in force in the Philippines, which have been recognized and approved by Congress and by this court.

As to the power of the Supreme Court of the Philippines to increase the penalty imposed by the lower court, that question has been finally disposed of by the decision in *Trono* v. *United States* (199 U. S., 521). It was contended there that the action of the appellate court in increasing the sentence put defendant twice in jeopardy for the same offense. But this court held that the appeal of the accused in such a case amounts to a waver of the plea of second jeopardy by asking that he be tried again for the offense for which he has once been convicted. "When at his own request he has obtained a new trial, he must take the burden with the benefit, and go back for a new trial on the whole case." In that case, as here, the question was also raised whether on appeal the Philippine Supreme Court had jurisdiction to reverse or revoke the judgment of the lower court and

itself convict the accused. On this point the court said (p. 534):

> The Supreme Court in so doing acted within its power and jurisdiction. It is a result of the ordinary procedure in the courts of that country, proceeding under the act of Congress already referred to [citing *Kepner* v. *United States*, 195 U. S., 100].

The plea of second jeopardy covered by the fourth assignment of error is also untenable. As already stated, accused set up in the Court of First Instance the allegation that he had been tried and acquitted in the municipal court on a charge of violation of the city ordinances, the complaints being based upon the same facts and evidence as those in the present case.

It appears that two complaints were presented against Flemister in the municipal court, charging him with violation of section 1 of Ordinance No. 28, enacted by the municipal board of Manila, March 19, 1902. (Rec., pp. 44, 45.) By stipulation the two complaints were consolidated for trial, the second complaint was dismissed, and defendant was found guilty upon the first complaint and sentenced to a fine (p. 47).

Examining these complaints in the municipal court and that filed in the Court of First Instance, it is seen that the charge in this case was "criminal attempt" against Feliciano Celemin, a police officer of Manila; in the first complaint filed in the municipal court defendant was charged with "breach of the peace" and using "personal violence upon one Domingo Salvador;" the second complaint in that court charged

defendant with uttering "slanderous, threatening, and abusive language" to Capt. Jose Crame. It is manifest, therefore, that the acts for which defendant was proceeded against in the municipal court are not the same as those with which he was charged in the Court of First Instance, but that they constitute separate and distinct offenses.

Further, comparing the city ordinance with articles 249 and 250 of the Penal Code, it will be seen that the two laws punish different offenses.

Section 1 of Ordinance No. 28 (Report Philippine Commission, 1902, pt. 2, p. 1213) provides:

> No person shall make, aid, countenance, or assist in making any riot, affray, disorder, disturbance, or breach of the peace; or assault, beat, or use personal violence upon another without just cause in any public place; or utter any slanderous, threatening, or abusive language or expression; or exhibit or display any emblem, transparency, representation, motto, language, device, instrument, or thing; or do any act in any public place, meeting, or procession tending to disturb the peace or excite a riot; or collect with other persons in a body or crowd for unlawful purpose; or disturb or disquiet any congregation engaged in any lawful assembly.

Article 249 of the Penal Code (paragraph 2) provides that the following persons commit criminal attempt:

> Those who attack the authorities or their agents, or employ force against them, or gravely intimidate them, or offer an equally

> grave resistance while they are discharging the functions of their office or on the occasion thereof.

Article 250 provides for the punishment of such criminal attempts as follows:

> The criminal attempts included in the preceding article shall be punished with the penalties of prisión correccional in its medium degree to prisión mayor in its minimum degree, and a fine of from 625 to 6,250 pesetas, provided that any of the following circumstances are attendant:
>
> 1. If the aggression were accomplished by weapons.
>
> 2. If those guilty thereof were public officials.
>
> 3. If the delinquents laid hands upon the authorities.
>
> 4. If, in consequence of compulsion, the authorities should have yielded to the exactions of the delinquents.
>
> 5. Without these circumstances the penalty shall be prisión correccional in its minimum to its medium degree and a fine of from 375 to 3,750 pesetas.

It was under paragraph 5 of the article just quoted that the Supreme Court of the Islands imposed the penalty in this case.

From an examination of the evidence adduced during the trial, the appellate court found as facts that while attending the races at San Lazaro Race Track, Manila, defendant tried to enter a gateway leading to a part of the grand stand re-

served for members of the jockey club alone, and upon an attempt being made by the porter, one Domingo Salvador, to prevent his entrance, he broke open the gate and forced his way through, throwing the attendant to the ground; that the policeman Celemin, seeing this conduct, endeavored to place defendant under arrest, whereupon defendant struck him, using vile, abusive, and threatening language toward him and other policemen who had assembled. (Rec., pp. 54–55.) Defendant's action in throwing down Salvador, the gate attendant, seems to have been the basis of the first complaint filed against him in the municipal court; and the second complaint in that court appears to have been based upon the language used by defendant to Captain Crame, one of the police officers who arrived on the scene while defendant was resisting arrest at the hands of Celemin. (Rec., pp. 9, 13, 14.)

It is thus apparent that while the acts charged in the Municipal Court and in the Court of First Instance grew out of the same occurrences they were different offenses in fact, and under the well-settled test they were distinct in point of law, one requiring certain evidence which the other did not. (1 Bishop's Criminal Law, sec. 1051; *Wilson* v. *State*, 24 Conn., 57; *Burton* v. *United States*, 202 U. S., 344, 381.) A plea of *autrefois acquit* must be upon a prosecution for the same identical offense. (4 Bl., 336.) As was said by Chief Justice Shaw in *Commonwealth* v. *Roby* (12 Pick., 496, 504), it must appear that the offense charged "was the same in law and in fact. The plea

will be vicious if the offenses charged in the two indictments be perfectly distinct in point of law, *however nearly they may be connected in fact.*" (See also *State* v. *Nash*, 86 N. C., 651.) To use the words of Gray, J., in *Morey* v. *Commonwealth* (108 Mass., 433), "The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes."

In *Carter* v. *McClaughry* (183 U. S., 365, 394) "conspiracy to defraud" and "causing false and fraudulent claims to be made" were held to be separate and distinct offenses requiring different evidence to support each charge, the court saying: "The fact that both charges related to and grew out of one transaction made no difference."

In *Burton* v. *United States* (202 U. S., 344) this court held that defendant could not plead his acquittal upon the charge of having received forbidden compensation *from Mahaney* (an officer of a certain company) in bar of a prosecution upon the charge of having received such compensation *from the company* itself.

> The plea of former jeopardy in this case presents a technical defense and can not be allowed for the reason that the offense of which the defendant was heretofore acquitted does not plainly appear, as matter of law, upon the face of the record, to be identical with the one of which he has been convicted in this case. (202 U. S., p. 380.)

Again, the same acts may constitute an offense against each of two sovereignties exercising jurisdiction over the same territory, and a prosecution brought by one does not necessarily bar a prosecution brought by the other. (*United States* v. *Chan Cun Chay*, 4 Official Gazette, 42.) The principle is well stated in *State* v. *Taylor* (133 N. C., 755, 759, 760):

> A single act may be an offense against two statutes and if each requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other. (*State* v. *Stevens*, 114 N. C., 873; *State* v. *Robinson*, 116 N. C., 1046.) Disorderly conduct, of which it is the duty and province of municipal authorities to take cognizance, may not, and often does not involve an assault. When it does so, the ordinance is directed against the *disorderly conduct* and the law of the State is directed against the breach of the peace. Bleckley, C. J. (in *McRea* v. *The Mayor*, 59 *Ga.*, 168; 27 Am. Rep., 390), says: "Many transactions which are made penal by the general law of the State may at the same time afford material for a proper police ordinance. The State may deal only with the central element of the transaction, which is fringed all around with adjuncts that ought to be prohibited by ordinances as highly mischievous to the quiet of municipal society."

The facts in that case bear a close relation to the present case. Defendant was indicted for an assault

with a deadly weapon, in violation of State law. He pleaded in bar a conviction in the mayor's court upon a charge of disturbing the peace in violation of a city ordinance, the two prosecutions growing out of the same transaction; but the plea was not sustained, for the reasons shown in the above quotation.

See also *Moore* v. *People*, 14 How., 17; *Fox* v. *Ohio*, 5 How., 432; *United States* v. *Marigold*, 9 How., 560; *United States* v. *Cruikshank*, 92 U. S., 542; *United States* v. *Barnhart*, 22 Fed. Rep., 285.

But it is not necessary to invoke this doctrine here because, as has already been shown, the offenses charged in the municipal court do not in fact include the offenses for which Flemister was tried in the Court of First Instance, and a comparison of the city ordinance with the provisions of the penal code referred to shows that the two laws punish different offenses, so that the court committed no error but was plainly justified in denying the plea of *autrefois acquit*.

It is respectfully submitted that the judgment of the lower court should be affirmed.

HENRY M. HOYT,
Solicitor-General.

CHARLES W. RUSSELL,
Assistant Attorney-General.

O

PARAISO *v.* UNITED STATES.

ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 23. Submitted December 2, 1907.—Decided December 16, 1907.

Where a case is brought up from the Circuit Court on the ground that the construction or application of the Constitution of the United States is involved, the record must show that the question was raised for the consideration of the court below; and, under § 10 of the act of July 1, 1902, 32 Stat. 695, this rule applies to writs of error to review judgments of the Supreme Court of the Philippine Islands.

A complaint, sufficiently clear to the mind of a person of rudimentary intelligence as to what it charges the defendant with, informs the accused of the nature and cause of the accusation against him, and a conviction

thereunder is not in that respect without due process of law under the Philippine bill of rights.

A motion for rehearing in the lower court on grounds set out in the assignment of error, but which was denied, cannot be relied on as properly raising the Federal question necessary to give this court jurisdiction. *McMillan* v. *Ferrum Mining Co.*, 197 U. S. 343.

This court is not called upon to consider errors argued but not assigned. *O'Neil* v. *Vermont*, 144 U. S. 323.

5 Philippine, 149, affirmed.

THE facts are stated in the opinion.

Mr. Aldis B. Browne and *Mr. Alexander Britton*, for plaintiff in error.

The Solicitor General and *Mr. Assistant Attorney General Russell*, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

The plaintiff in error was convicted of falsification of documents, under Article 300, clauses 4, 7 of the Philippine Penal Code. He brings the case here as one in which a statute of the United States is involved, under the act of July 1, 1902, c. 1369, § 10, 32 Stat. 695. By the article mentioned a public official is subjected to imprisonment and fine if he commits a falsification, clause 4, "By perverting the truth in the narration of facts," or, clause 7, "By giving out an authentic copy of a fictitious document, or by stating therein a contrary or different thing from that contained in the genuine original." It is assigned as error that the plaintiff in error was required to answer without being advised of the nature and cause of the accusation against him, and that he was convicted without due process of law. It is argued further, although not assigned as error, that the sentence inflicted a cruel and unusual punishment, by reason of the amount of the fine and the length of the term of imprisonment, and still further, that the fine was greater than that which the statute imposed, all contrary to the Philippine bill of rights. Act of July 1, 1902, c. 1369, § 5, 32 Stat. 691, 692.

There is no suggestion in the record that any of these ques-

tions were raised at any stage below, except in an agreement of counsel that the full record showed that before any evidence was received the plaintiff in error asked leave to withdraw his plea of not guilty and substitute the statement that he did not know how to plead, which was denied, and that he objected to the reception of any evidence in support of the complaint, because it was incapable of being sustained by evidence, which objection was overruled. There was a motion for rehearing, on the grounds set out in the assignment of error, but as the motion was denied, that cannot be relied upon here. See *McMillen* v. *Ferrum Mining Co.*, 197 U. S. 343. It would be going far in allowance for different habits of thought and action, to treat what was done as equivalent to a demurrer. The court below does not so interpret it, but says that no exception was taken to the sufficiency of the complaint. It would be going farther to treat it as setting up the Philippine bill of rights in analogy to a claim of constitutional rights in a Circuit Court of the United States. If a case is brought up from the Circuit Court on the ground that it involves the construction or application of the Constitution of the United States, the record must show that the question was raised for the consideration of the court below. *Carey* v. *Houston & Texas Central Ry. Co.*, 150 U. S. 170, 181; *Ansbro* v. *United States*, 159 U. S. 695; *Cornell* v. *Green*, 163 U. S. 75, 78; *Cincinnati, Hamilton & Dayton R. R. Co.* v. *Thiebaud*, 177 U. S. 615, 619, 620; *Arkansas* v. *Schlierholz*, 179 U. S. 598. The most that could be gathered from this record is that the plaintiff in error contended that the complaint was bad by the rules of criminal pleading. See *Cornell* v. *Green*, 163 U. S. 75, 79. There was no hint that he relied on the bill of rights or contended that the complaint would not satisfy that. The bill of rights, in all probability, was an afterthought when everything else had failed.

Our consideration of the case properly might stop here. But, as the rule laid down probably was not well known, we will add that we find nothing in the errors assigned. The com-

plaint, however open it might be to criticism on demurrer, supposing the strict rules of the old common law should be applied, would leave no doubt in the mind of any person of rudimentary intelligence that it meant to charge the defendant with falsely entering on the stubs of certain specified tax certificates smaller sums than those shown by the certificates and actually received by him, and with altering such stubs to lower sums, with intent of gain; (that is to say, with intent to settle his accounts as a public officer on the showing that less was due than was due in fact), contrary to Article 300, clauses 4, 6 and 7 of the Penal Code.[1] If the Philippine Code had sanc-

[1] The complaint is as follows, omitting the title, signature and verification:

The undersigned accuses José Paraiso of the crime of falsification, committed as follows: That the said José Paraiso, in his capacity as municipal treasurer of Lumbang, entered upon registration tax certificate No. 481,054, issued at Lumbang the 31st of May, 1904, to one Pedro Robie, the amount of $6.00, and erased from the stub thereof the figures written thereon, with the exception of the two-00, leaving traces of the figure thus erased, there appearing, however, upon the same stub, written in pencil by the accused, the figures 2.00, this being the amount shown on the abstract submitted to the provincial treasurer, all of this with intent of gain.

That on registration tax certificate No. 481,052, issued at Lumbang on the 31st day of May, 1904, to Francisco Guimoc, he entered the amount of $4 as the price of the said certificate, whereas on the stub thereof he only entered the amount of $2, thereby committing the crime of falsification of a document, provided for and penalized under paragraphs 4, 6 and 7 of section 300 of the Penal Code. It further appears from the abstract submitted by him that the amount received was $2.00, thus defrauding the government to his personal advantage and gain.

That at different times during the year 1904, in his capacity as municipal treasurer of the town of Lumbang, Laguna, he issued registration tax certificates to the following persons under the following numbers:

Eduardo Llantos, No. 481053; Damaso Garcia, No. 481044; Apolinario Almario, No. 339727; Cenon Labra, No. 339899; Pablo Cristobal, No. 339897; Luis Abi, No. 339877; Leon Mondes, No. 339852; Luis Valdomora, No. 339848; Gregorio Mulingbayan, No. 339846; Filemon Mercado, No. 339840; Pablo Samonte, No. 339795; Mariano Magano, No. 339785; Vicente Valdeavella, No. 339783; Juan Wadis, No. 339763; Mateo Laguartilla, No. 339744; Faustino Rosales, No. 339707; Deogracias Babia, No. 339701; Dionisio Abad, No. 339694; Eduardo Ramillosa, No. 339673; Monico Abad, No. 339660; Conrado Lagunda, No. 339632; Juan Tablico, No. 339605; Ubaldo Mercado, No. 339541; Juan Puhauan, No. 339510; Antonio Eborda, No. 339379; Cirilia del Castillo, No. 339375; Valeriano de Ramos, No. 339341; Mateo

tioned this form, it is extravagant to contend that the enactment would have been void under the laws of the United States. Yet that is a test. See *Missouri* v. *Dockery*, 191 U. S. 165, 171. The bill of rights for the Philippines giving the accused the right to demand the nature and cause of the accusation against him does not fasten forever upon those islands the inability of the seventeenth century common law to understand or accept a pleading that did not exclude every misinterpretation capable of occurring to intelligence fired with a desire to pervert.

We do not feel called upon to consider errors not assigned. See *O'Neil* v. *Vermont*, 144 U. S. 323, 331.

Writ of error dismissed.

MR. JUSTICE HARLAN dissents.

FLEMISTER *v.* UNITED STATES.

ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 70. Submitted December 5, 1907.—Decided December 16, 1907.

Trono v. *United States*, 199 U. S. 521, followed as to the power of the Supreme Court of the Philippine Islands to increase the sentence of one convicted in the court of first instance and appealing to the Supreme Court.

One is not placed in second jeopardy within the meaning of the Philippine bill of rights by being tried for an assault on an officer because he has already been convicted for a breach of the peace and assault upon another

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Pacoma, No. 339313; Mariano Valdeavella, No. 339491; Benedicto Valdeavella, No. 339490; Juan Mercado, No. 339477; Epifanio Vellestro, No. 339445; Marcelino Cabalsa, No. 339499; Marcelo Tabirao, No. 339905; Placido Macadagay, No. 339837; Juan Valeavella, No. 339604; Bernabe Yamballa, No. 339558; Léon Abi, No. 339540; upon which said certificates there appear to have been entered and collected by the accused larger amounts than those shown on their corresponding stubs after he had settled his accounts with the provincial treasurer; and that the said stubs, or most of them, contain erasures, changes and alterations, all of which said acts are punishable under paragraphs 4, 6 and 7 of section 300 of the Penal Code, relating to the crime of falsification, for the purpose of gain.

person at the same time and place, and where it appears that the assault on the officer was not relied on or proved as part of the offence for which he was first convicted.

5 Philippine, 650, affirmed.

THE facts are stated in the opinion.

Mr. E. J. Bowers, for plaintiff in error:

By appeal from the judgment of the court of first instance of the city of Manila the accused did not waive his immunity from second jeopardy on the charge of the commission of the offense embraced in Art. 249 of the Penal Code. *Hopt* v. *Utah*, 110 U. S. 574; *Thompson* v. *Utah*, 170 U. S. 343; *People* v. *Dowling*, 84 N. Y. 478; *Guenther* v. *People*, 24 N. Y. 100; *People* v. *Cignarale*, 110 N. Y. 23, 30; *Stuart* v. *Commonwealth*, 28 Gratt. 950; *State* v. *Martin*, 30 Wisconsin, 216; *State* v. *Hills*, 30 Wisconsin, 416; *State* v. *Belden*, 33 Wisconsin, 120; *Stanghler* v. *State*, 6 Humph. 410; *Brennan* v. *People*, 15 Illinois, 511; *Bamett* v. *People*, 54 Illinois, 325; *Sipple* v. *People*, 10 Bradwell, 144; *Morris* v. *State*, 8 S. & M. (Miss.) 762; *Johnson* v. *State*, 29 Arkansas, 31; *State* v. *Tweidy*, 11 Iowa, 350; *State* v. *Ross*, 29 Missouri, 32; *State* v. *Kotteeman*, 35 Missouri, 105; *Johnson* v. *State*, 27 Florida, 245; *Golding* v. *State*, 31 Florida, 262; *Dennison* v. *State*, 31 La. Ann. 847; *State* v. *Murphy*, 13 Washington, 229; *Bell* v. *State*, 48 Alabama, 684; *Berry* v. *State*, 65 Alabama, 163; *Brown* v. *United States*, 52 S. W. Rep. 56; *Jones* v. *State*, 13 Texas, 168; *State* v. *Stevens*, 29 Oregon, 85; *People* v. *Knapp*, 26 Michigan, 112, 113; *People* v. *Comstock*, 55 Michigan, 405, 407; *State* v. *Ketter*, 2 Tyler (Utah), 472.

The Solicitor General and *Mr. Assistant Attorney General Russell*, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

The plaintiff in error was convicted of a criminal attempt against an agent of the authorities by striking one Feliciano

Celimin, a policeman, who was trying to arrest him, and by using vile, abusive and threatening language to the same officer, contrary to Article 249, clause 2, of the Penal Code of the Philippines. He was sentenced under Article 250, which provides the punishment for such attempts. He was convicted in the court of first instance of the same facts, but was sentenced under Article 252, which punishes those, who, without being included in Article 249, should resist the authorities or their agents. He then appealed, whereupon the Supreme Court decided that the offense fell within Article 249, and increased the sentence. The errors assigned are that the Supreme Court had no jurisdiction to increase the sentence, this being stated in various forms, and that "The decision of the court places the accused in jeopardy for the same offense according to the corresponding provisions of Section 5 of the Act of Congress of July 1, 1902." There is also the usual averment that the decision deprives the accused of his liberty without due process of law, but that may be passed over, as there is nothing in the record to justify it. It is not necessary to consider what would amount to denial of due process of law. The plaintiff in error was convicted after a full trial, with all the usual forms, upon a specific and definite complaint and evidence warranting the result.

The objection to the power of the Supreme Court to increase the sentence is disposed of by the recent decision in *Trono* v. *United States*, 199 U. S. 521. The only assignment of error that needs a word is that which was intended to rely upon a previous conviction that was pleaded and put in evidence. This was a conviction by a municipal court of a violation of ordinances of the city of Manila by disorderly conduct, a breach of the peace, and the assault upon one Domingo Salvador at the same time and place as the assault alleged in the complaint before us. Perhaps it should be added that a second complaint under the ordinances for slanderous, threatening and abusive language to Captain José Crame of the Manila Police Department was dismissed by the municipal judge on the

ground that the offense could not be split up. None of the acts alleged in these complaints was the assault upon Celimin, relied upon in the present case, and it does not appear that the assault upon Celimin was relied on or proved as part of the disorderly conduct for which the plaintiff in error was punished in the municipal court. It is unnecessary to consider whether the same conduct could be punished at the same time on the same grounds by both a superior and subordinate authority in the same jurisdiction. There is nothing in the Philippine bill of rights that forbids assaults on two individuals being treated as two offenses, even if they occur very near each other in one continuing attempt to defy the law. We cannot revise the finding of the courts below that the two offenses were distinct.

Judgment affirmed.

MR. JUSTICE HARLAN dissents.